MINNESOTA RULES OF CRIMINAL PROCEDURE

With amendments effective
through April 1, 2007

Rule 1. Scope, Application, General Purpose and Construction

Rule 1.01 Scope and Application

These rules govern the procedure in prosecutions for felonies, gross misdemeanors, misdemeanors, and petty misdemeanors in the district courts in the State of Minnesota. Except where expressly provided otherwise, misdemeanors as referred to in these rules shall include state statutes, local ordinances, charter provisions, rules or regulations punishable either alone or alternatively by a fine or by imprisonment of not more than 90 days.

Comment—Rule 1

See comment following Rule 1.04.

Rule 1.02 Purpose and Construction

These rules are intended to provide for the just, speedy determination of criminal proceedings without the purpose or effect of discrimination based upon race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, handicap in communication, sexual orientation, or age. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Comment—Rule 1

See comment following Rule 1.04.

Rule 1.03 Local Rules By District Court

Any court may recommend rules governing its practice not in conflict with these rules or with the General Rules of Practice for the District Courts and those rules shall become effective as ordered by the Supreme Court.

Comment—Rule 1

See comment following Rule 1.04.

Rule 1.04 Definitions

(a) Clerk of Court. References in these rules to clerks or deputy clerks of court shall include court administrators and deputy court administrators.

(b) Designated Gross Misdemeanors. As used in these rules, the term "designated gross misdemeanors" refers to gross misdemeanors charged or punishable under Minn. Stat. § 169A.20, Minn. Stat. § 169A.25, Minn. Stat. § 169A.26 or Minn. Stat. § 171.24.

(c) Tab Charge. As used in these rules, the term "tab charge" is a brief statement of the offense charged including a reference to the statute, rule, regulation, ordinance, or other provision of law which the defendant is alleged to have violated which the clerk shall enter upon the records. A tab charge is not synonymous with "citation" as defined by Rule 6.01.

(d) Aggravated Sentence. As used in these rules, the term "aggravated sentence" refers to a sentence that is an upward durational or dispositional departure from the presumptive sentence provided for in the Minnesota Sentencing Guidelines based upon aggravating circumstances or a statutory sentencing enhancement.

Comment—Rule 1

By Rule 1.01, these rules govern the procedure in prosecutions for felonies, gross misdemeanors, misdemeanors, and petty misdemeanors in the district courts in the State of Minnesota. Except where expressly provided otherwise, misdemeanors as referred to in these rules shall include state statutes, local ordinances, charter provisions, rules or regulations punishable either alone or alternatively by a fine or by imprisonment of not more than 90 days.

Rule 1.02 governing the general purpose and construction of the rules is taken from F.R.Crim.P. 2.

In accord with the purpose of these rules to provide for a just and speedy determination of criminal proceedings, the rules specify time limits and consolidate court appearances and hearings whenever possible. Rule 11 provides for an Omnibus Hearing for the determination of all pre-trial issues. Under Rules 8.04, 11.04, and 11.07, that hearing must be commenced within 28 days after the appearance under Rule 8 and must be completed and all issues decided within 30 days after the appearance under Rule 8. Extensions of those time limits may be permitted by the trial court, but only for good cause related to the particular case. It would violate the purpose of these rules to bifurcate or further continue Omnibus Hearings on a general basis unrelated to the circumstances of a particular case.

It is further the express purpose of these rules that they be applied without discrimination based upon the factors stated in Rule 1.02. The factors are the same as those set forth in Chapter 363 of the Minnesota Statutes forbidding discriminatory

practices in employment and certain other situations except that those handicapped in communication are added to the list of those protected against discrimination. Minn. Stat. §§ 611.31-611.34 (1992). The Minnesota Supreme Court Task Forces on Gender Fairness and Racial Bias have studied and documented gender and racial bias in the legal system. Their reports issued June 30, 1989 and May, 1993 respectively contain recommendations to address these problems. See 15 Wm. Mitchell L.Rev. 827 (1989) (gender fairness report) and 16 Hamline L.Rev. 477 (1993) (racial bias report). Any recommendations in those reports concerning the Rules of Criminal Procedure have been reviewed carefully and appropriate revisions have been made in these rules.

Beyond the procedures required by these rules, prosecutors, courts, and law enforcement agencies should also be aware of the rights of crime victims as provided in chapter 611A of the Minnesota Statutes. This would include, but is not limited to, the prosecutor's duty to provide notice of a prospective plea agreement (Minn. Stat. § 611A.03); referral to a pretrial diversion program (Minn. Stat. § 611A.031); dismissal of domestic assault or harassment proceedings (Minn. Stat. § 611A.0315); the final disposition of the case (Minn. Stat. § 611A.039); and the pendency of an appeal of the proceedings (Minn. Stat. § 611.0395). Also see Minn. Stat. § 629.72, subd. 7 and Minn. Stat. § 629.725 as to the duty of the court to provide notice of any hearing on release of the defendant from pretrial detention in domestic abuse, harassment or crimes of violence cases, and Minn. Stat. § 629.73 as to the duty of the agency having custody of the defendant in such cases to provide notice of the defendant's impending release.

Rule 1.03 is identical to Rule 83 of the Minnesota Rules of Civil Procedure and is intended to assure uniformity in local rules. The General Rules of Practice for the District Court were adopted by the Supreme Court effective January 1, 1992 to consolidate and make uniform the local rules of practice throughout the state. Only a few of the previously existing local rules were preserved as special rules for particular judicial districts. No local rule is permitted which would conflict with these Rules of Criminal Procedure and to be effective any new local rule must first be approved by the Supreme Court.

Rule 1.04(a) clarifies that any duties, functions or responsibilities set forth in the rules for clerks or deputy clerks also apply to court administrators and deputy court administrators. This is in accord with Minn. Stat. § 485.01 (1997). Under Rule 4.02, subd. 5(3) it is possible to commence a prosecution by tab charge for certain designated gross misdemeanors. See Rule 4.02, subd. 5(3) and the comments to that rule for the limitations on such prosecutions. That term is also used in various other places throughout the rules and Rule 1.04(b) specifies the offenses which are considered to be "designated gross misdemeanors". Minnesota Statutes § 169A. relates to driving, operating, or physical control of a motor vehicle while under the influence of alcohol or a controlled or hazardous substance or refusing to submit to a chemical test and Minn. Stat. § 171.24 (1997) relates to driving after cancellation. Minnesota Statutes § 169A.25 (second-degree driving while impaired), and Minn. Stat. § 169A.26 (third-degree driving while impaired) establish the circumstances under which violations of Minn. Stat. § 169A.20 constitute a gross misdemeanor.

Rule 1.04 (d) defines "aggravated sentence" for the purpose of the provisions in these rules governing the procedure that a sentencing court must follow to impose an upward sentencing departure in compliance with Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). On June 24, 2004, the United States Supreme Court decided in

Blakely that an upward departure in sentencing under the State of Washington's determinate sentencing system violated the defendant's Sixth Amendment rights where the additional findings required to justify the departure were not made beyond a reasonable doubt by a jury. The definition is in accord with existing Minnesota case law holding that Blakely applies to upward departures under the Minnesota Sentencing Guidelines and under various sentencing enhancement statutes requiring additional factual findings. See, e.g., State v. Shattuck, 704 N.W.2d 131 (Minn. 2005) (durational departures); State v. Allen, 706 N.W.2d 40 (Minn. 2005) (dispositional departures); State v. Leake, 699 N.W.2d 312 (Minn. 2005) (life sentence without release under Minnesota Statutes, section 609.106); State v. Barker, 705 N.W.2d 768 (Minn. 2005) (firearm sentence enhancements under Minnesota Statutes, section 609.11); and State v. Henderson, 706 N.W.2d 758 (Minn. 2005) (career offender sentence enhancements under Minnesota Statutes section 609.1095, subd. 4). However, these Blakely-related protections and procedures do not apply retroactively to sentences that were imposed and were no longer subject to direct appeal by the time that Blakely was decided on June 24, 2004. State v. Houston, 702 N.W.2d 268 (Minn. 2005). Also, the protections and procedures do not apply to sentencing departures and enhancements that are based solely on a defendant's criminal conviction history such as the assessment of a custody status point under the Minnesota Sentencing Guidelines. State v. Allen, 706 N.W.2d 40 (Minn. 2005). For aggravated sentence procedures related to Blakely, see Rule 7.03 (notice of prosecutor's intent to seek an aggravated sentence in proceedings prosecuted by complaint); Rule 9.01, subd. 1(7) (discovery of evidence relating to an aggravated sentence); Rule 11.04 (Omnibus Hearing decisions on aggravated sentence issues); Rule 15.01, subd. 2 and Appendices E and F (required questioning and written petition provisions concerning defendant's admission of facts supporting an aggravated sentence and accompanying waiver of rights); Rule 19.04, subd. 6(3) (notice of prosecutor's intent to seek an aggravated sentence in proceedings prosecuted by indictment); Rule 26.01, subd. 1(2)(b) (waiver of right to a jury trial determination of facts supporting an aggravated sentence); Rule 26.01, subd. 3 (stipulation of facts to support an aggravated sentence and accompanying waiver of rights); Rules 26.03, subd. 17(1) and (3) (motion that evidence submitted to jury was insufficient to support an aggravated sentence); Rule 26.03, subd. 18(6) (verdict forms); Rule 26.03, subd. 19(5) (polling the jury); and Rule 26.04, subd. 1 (new trial on aggravated sentence issue). The procedures provided in these rules for the determination of aggravated sentence issues supersede the procedures concerning those issues in Minnesota Statutes, section 244.10 (see 2005 Minnesota Laws, chapter 136, article 16, sections 3-6) or other statutes.

Rule 2. Complaint

Rule 2.01 Contents; Before Whom Made

The complaint is a written signed statement of the essential facts constituting the offense charged.

Except as provided in Rules 11.06 and 15.08, it shall be made upon oath before a judge or judicial officer of the district court, clerk or deputy clerk of court, or notary public.

Except as provided in Rules 6.01, subd. 3, 11.06 and 15.08, the facts establishing probable cause to believe that an offense has been committed and that the defendant committed it shall be set forth in writing in the complaint, and may be supplemented by

supporting affidavits or by sworn testimony of witnesses taken before the issuing judge or judicial officer. If sworn testimony is taken, a note so stating shall be made on the face of the complaint by the issuing officer. The testimony shall be recorded by a reporter or recording instrument and shall be transcribed and filed. Upon the information presented, the judge or judicial officer shall determine whether there is probable cause to believe that an offense has been committed and that the defendant committed it. When the offense alleged to have been committed is punishable by fine only, the determination of probable cause may be made by the clerk or deputy clerk of court if authorized by court order.

Any complaint, supporting affidavits, or supplementary sworn testimony made or taken upon oath before the issuing judge or judicial officer pursuant to this rule may be made or taken by telephone, facsimile transmission, video equipment, or similar device at the discretion of such judge or judicial officer.

Comment—Rule 2

See comment following Rule 2.03.

Rule 2.02 Approval of Prosecuting Attorney

A complaint shall not be filed or process issued thereon without the written approval, endorsed on the complaint, of the prosecuting attorney authorized to prosecute the offense charged, unless such judge or judicial officer as may be authorized by law to issue process upon the offense certifies on the complaint that the prosecuting attorney is unavailable and the filing of the complaint and issuance of process thereon should not be delayed.

Comment—Rule 2

See comment following Rule 2.03.

Rule 2.03 Complaint Forms--Felony or Gross Misdemeanors

For all complaints charging a felony or gross misdemeanor offense the prosecuting attorney or such judge or judicial officer authorized by law to issue process pursuant to Rule 2.02 shall use an appropriate form authorized and supplied by the State Court Administrator or a word processor-produced complaint form in compliance with the supplied form and approved by Information Systems Office, State Court Administration. If for any reason such form is unavailable, failure to comply with this rule shall constitute harmless error under Rule 31.01.

Comment—Rule 2

Under these rules (See Rules 10.01, 8.01, 17.01), the complaint, tab charge and indictment are the only accusatory pleadings by which a prosecution may be initiated and upon which it may be based. The complaint will take the place of the information under existing practice (Minn. Stat. §§ 628.29-628.33 (1971)).

By Rule 2.01 the complaint shall consist of a written signed statement of the essential facts constituting the offense charged. This language is taken from F.R.Crim.P.

3. (Present Minnesota statutory law (Minn. Stat. §§ 629.42, 633.03 (1971)) simply provides for the complaint of an offense to be reduced to writing, but does not specify what the complaint shall contain.) The complaint shall otherwise conform to the provisions of Rules 17.02, 17.03. Minn. Stat. §§ 487.25, subd. 3; 488A.10, subd. 3, and 488A.27, subd. 3 govern the procedure for the issuance of complaints in the County Courts, Hennepin County Municipal Court and St. Paul Municipal Court, respectively, but also do not specify what the complaint shall contain.

Except as provided in Rules 11.06 and 15.08 authorizing the substitution of a new complaint to permit a plea to a misdemeanor or different offense, the complaint shall be sworn to before any judge or judicial officer of a district court, clerk or deputy clerk of court, or a notary public.

Where the alleged offense is punishable only by a fine, as for a petty misdemeanor, the determination of probable cause may be made by a clerk or deputy clerk of court if court order authorizes this procedure. The clerk or deputy clerk could also issue a summons in such a case under Rule 3.01, but is not permitted to issue a warrant. Except for this requirement of authorization by court order in Rule 2.01, this provision is consistent with previous Minnesota law under Minn. Stat. §§ 629.42 (1971); 487.25, subd. 3 (1973) (governing county courts); 488A.10, subd. 3 (1971) (governing Hennepin County Municipal Court); 488A.27, subd. 3 (1971) (governing St. Paul Municipal Court); and 488.17, subd. 3 (1971) (governing all other municipal courts). This power may be constitutionally exercised by a detached and neutral clerk or deputy clerk under Shadwick v. City of Tampa, 407 U.S. 345 (1972). See Rule 3.01 as to the issuance of a summons by a clerk or deputy clerk of court.

Except as provided in Rules 6.01, subd. 3, 11.06 and 15.08, the probable cause statement shall be set forth separately in the complaint, and the complaint may be supplemented by supporting affidavits or sworn recorded testimony. If affidavits, testimony, or other reports are used to supplement the complaint, it is still necessary to include in the complaint a statement of the facts establishing probable cause. Under this rule it is permissible, for the complaint and any supporting affidavits to be sworn to before a clerk, deputy clerk or notary public. The documents may then be submitted to the judge or judicial officer by any of the methods permitted under the rule and the law enforcement officer or other complainant need not personally appear before the issuing judge or judicial officer. However, if sworn oral testimony is taken to supplement the complaint, it must be taken before the judge or judicial officer and cannot be taken before a clerk, deputy clerk or notary public. If supplemental testimony is taken a note so stating shall be made on the face of the complaint so that an interested party or attorney examining the complaint will have notice that such testimony was taken.

Rule 2.01 permits the judge or judicial officer to review the complaint and any supporting affidavits or supplementary testimony and to administer the oath by telephone, video equipment, or similar electronic device. Any supplementary testimony so taken shall be recorded, transcribed and filed. If the complaint is issued and a warrant is also necessary, they may be transmitted by facsimile transmission as permitted by Rule 33.05. By this method, much time, travel and expense can be saved in those counties where a judge is not readily available to the complainant.

References in the rules to clerks of court for the trial courts include court administrators. See Minn. Stat. § 485.01 (1988) authorizing court administrators to

perform any duties, functions and responsibilities required of clerks of court.

Rules 11.06 and 15.08 authorizing the substitution of a new complaint to permit a plea to a misdemeanor or different offense do not require a showing of probable cause. Rule 3.01 does not attempt to define probable cause for the purpose of obtaining a warrant of arrest or to prescribe the evidence that may be considered upon that issue. That is determined by federal constitutional law under the Fourth Amendment. (See e.g., State ex rel. Duhn v. Tahash, 275 Minn. 377, 147 N.W.2d 382 (1967); State v. Burch, 284 Minn. 300, 170 N.W.2d 543 (1969).

Rule 2.02 requires the prosecuting attorney's written approval of the filing of a complaint. This is in accord with ABA Standards, Prosecution Function 3.4 (Approved Draft, 1968) that the decision to institute criminal proceedings shall be initially and primarily the responsibility of the prosecutor. Similar provisions are contained in ALI Model Code of Pre-Arraignment Procedures, § 6.02 (T.D. § 1, 1966) and Wis. Stat. § 968.02(1), (3).

The prosecuting attorneys referred to in Rule 2.02 are those authorized by law to prosecute the offense charged. (See Minn. Stat. § 487.25, subd. 10 (1971) (county courts); Minn. Stat. §§ 488A.10, subd. 11, 488A.101 (1971) (Municipal Court of Hennepin County); Minn. Stat. § 488A.27, subd. 11 (1971) (Municipal Court of St. Paul); Minn. Stat. § 488A.41 (1971) (Municipal Court of Duluth); Minn. Stat. § 488.17, subd. 9 (1971) (Municipal Courts in Ramsey and St. Louis Counties); Minn. Stat.§§ 8.01, 8.03 (1971) (Attorney General); Minn. Stat. § 388.05 (1971) (County Attorney).)

If the prosecuting attorney is unavailable and it is necessary that the complaint be filed at once, the judge authorized to issue process on the complaint or the judicial officer with that power may permit the complaint to be filed and upon a finding of probable cause, issue process thereon.

Rule 2.02 leaves to other laws the question of the available remedy when a local prosecutor refuses to approve a complaint.

Because the documents supporting the statement of probable cause may contain irrelevant material, material that is injurious to innocent third persons, and material prejudicial to defendant's right to a fair trial, it is the recommended practice that a statement be drafted containing the facts establishing probable cause, in or with the complaint, and that irrelevant material, material injurious to innocent third persons and material prejudicial to defendant's right to a fair trial be omitted therefrom.

Rule 2.03 requires the use by the prosecuting attorney, judge or judicial officer of the uniform complaint forms supplied by the State Court Administrator when charging a felony or gross misdemeanor offense. All efforts shall be made to obtain and implement these forms, but in the event the form is unavailable at the time the offense is charged, failure to use the specific form is to constitute harmless error under Rule 31.01.

Exemplary copies of the mandatory forms are contained in the general form section of these Rules.

Rule 3. Warrant or Summons upon Complaint

Rule 3.01 Issuance

If it appears from the facts set forth in writing in the complaint and any supporting affidavits or supplemental sworn testimony that there is probable cause to believe that an offense has been committed and that the defendant committed it, a summons or warrant shall be issued. A summons shall be issued rather than a warrant unless it reasonably appears that there is a substantial likelihood that the defendant will fail to respond to a summons, or the defendant's whereabouts is not reasonably discoverable, or the arrest of the defendant is necessary to prevent imminent harm to the defendant or another. If issued, a warrant for the arrest of the defendant shall be issued to any person authorized by law to execute it.

The warrant or summons shall be issued by a judge or judicial officer of the district court. Provided that when the offense is punishable by fine only, the clerk or deputy clerk of court may also issue the summons when authorized by court order.

When the offense is punishable by fine only, in misdemeanor cases, a summons shall be issued in lieu of a warrant.

The issuing officer shall issue a summons whenever requested to do so by the prosecuting attorney authorized to prosecute the offense charged in the complaint.

If a defendant fails to appear in response to a summons, a warrant shall issue.

Comment—Rule 3

See comment following Rule 3.04.

Rule 3.02 Contents of Warrant or Summons

Subd. 1. Warrant. The warrant shall be signed by the issuing officer and shall contain the name of the defendant, or, if unknown, any name or description by which the defendant can be identified with reasonable certainty. It shall describe the offense charged in the complaint, and the warrant and complaint may be combined in one form. For all offenses, the amount of bail shall and other conditions of release may be set by the issuing officer and endorsed on the warrant.

Subd. 2. Directions of Warrant. The warrant shall direct that the defendant be brought promptly before the court that issued the warrant if it is in session.

If the court specified is not in session, the warrant shall direct that the defendant be brought before a judge or judicial officer of such court, without unnecessary delay, and in any event not later than 36 hours after the arrest exclusive of the day of arrest, or as soon thereafter as such judge or judicial officer is available.

Subd. 3. Summons. The summons shall summon the defendant to appear at a stated time and place to answer the complaint before the court issuing it and shall be accompanied by a copy of the complaint.

Comment—Rule 3

See comment following Rule 3.04.

Rule 3.03 Execution or Service of Warrant or Summons; Certification

Subd. 1. By Whom. The warrant shall be executed by an officer authorized by law. The summons may be served by any officer authorized to serve a warrant, and if served by mail, it may also be served by the clerk of the court from which it is issued.

Subd. 2. Territorial Limits. The warrant may be executed or the summons may be served at any place within the State except where prohibited by law.

Subd. 3. Manner. The warrant shall be executed by the arrest of the defendant. If the offense charged is a misdemeanor the defendant shall not be arrested on Sunday or between the hours of 10:00 o'clock p.m. and 8:00 o'clock a.m. on any other day except by direction of the issuing officer, endorsed on the warrant when exigent circumstances exist or when the person named in the warrant is found on a public highway or street. The officer need not have the warrant in possession at the time of the arrest, but shall inform the defendant of the existence of the warrant and of the charge.

The summons shall be served on an individual defendant by delivering a copy to the defendant personally or by leaving it at the defendant's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein or by mailing it to the defendant's last known address. A summons directed to a corporation shall be issued and served in the manner prescribed by law for service of summons on corporations in civil actions or by mail addressed to the corporation at its principal place of business or to an agent designated by the corporation to receive service of process.

Subd. 4. Certification; Unexecuted Warrant or Summons. The officer executing the warrant shall certify the execution thereof to the court before which the defendant is brought.

On or before the date set for appearance the officer or clerk of court to whom a summons was delivered for service shall certify the service thereof to the court before which the defendant was summoned to appear.

At the request of the prosecuting attorney made at any time while the complaint is pending, a warrant returned unexecuted or a summons returned unserved or a duplicate thereof may be delivered by the issuing officer to any authorized officer or person for execution or service.

Comment—Rule 3

See comment following Rule 3.04.

Rule 3.04 Defective Warrant, Summons or Complaint

Subd. 1. Amendment. A person arrested under a warrant or appearing in response to a summons shall not be discharged from custody or dismissed because of any defect in form in the warrant or summons, if the warrant or summons is amended so as to remedy the defect.

Subd. 2. Issuance of New Complaint, Warrant or Summons. During pre-trial proceedings affecting any person arrested under a warrant or appearing in response to a summons issued upon a complaint, the proceedings may be continued to permit a new complaint to be filed and a new warrant or summons issued thereon, provided the prosecuting attorney promptly moves for such continuance on the ground:

(a) that the initial complaint does not properly name or describe the defendant or the offense charged; or

(b) that on the basis of the evidence presented at the proceeding it appears that there is probable cause to believe that the defendant has committed a different offense from that charged in the complaint and that the prosecuting attorney intends to charge the defendant with such offense.

If the proceedings are continued, the new complaint shall be filed and process issued thereon as soon as possible. In misdemeanor cases, if the defendant during the continuance is unable to post any bail which might be required under Rule 6.02, subd. 1, then the defendant must be released subject to such non-monetary conditions as deemed necessary by the court under that Rule.

Comment—Rule 3

When probable cause in accordance with Rule 2.01 appears from the evidence set forth in the complaint and any supporting affidavits or supplemental testimony, Rule 3.01 authorizes the issuance of a warrant or summons. This rule is similar to F.R.Crim.P. 4 and in authorizing issuance of a summons follows ABA Standards, Pre-Trial Release 3.1 (Approved Draft, 1979) and ALI Model Code of Pre-Arraignment Procedures § 6.04(1) (T.D. § 1, 1966). Except in the case of a corporate defendant (Minn. Stat. § 630.15 (1971)), Minnesota statutory law had no provision for issuance of a summons in lieu of a warrant.

In all cases, the issuing officer must issue a summons instead of a warrant unless there is a substantial likelihood that the accused will not respond to a summons, or the defendant's whereabouts is not reasonably discoverable, or the arrest of the defendant is necessary to prevent harm to the defendant or another. This test is consistent with that in Rule 6 governing the mandatory issuance of citations in lieu of making an arrest and is based on ABA Standards, Pre-Trial Release 3.2 (Approved Draft, 1979). Under this test, simply not knowing the defendant's address without some further effort to locate the defendant is not sufficient to justify issuance of a warrant. This requirement is imposed to lessen the danger that warrants will be disproportionately issued against economically disadvantaged persons simply because they do not currently have a permanent residence or their address is more difficult to determine. The revision of this standard is in accord with the recommendation of the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System in its Final Report of May, 1993, that the criteria for issuance of a summons or citation be examined to ensure that they are race neutral.

A summons must be issued instead of a warrant when the defendant is charged with a misdemeanor offense punishable by fine only. This stringent restriction on the issuance of warrants is considered justified to prevent the incarceration, even temporarily, of a defendant pending arraignment on a charge which the state or other governmental unit has decided does not even merit incarceration upon conviction. If the defendant fails to respond to the summons, a warrant may be issued.

Additionally, a summons shall be issued if the prosecuting attorney requests it.

See also Rule 4.02, subd. 5(3) for restrictions on the issuance of a warrant for an offense for which the prosecution has obtained a valid complaint after the time in which the court had ordered the complaint to be prepared.

Issuance of a warrant instead of a summons should not be grounds for objection to the arrest, to the jurisdiction of the court, or to any subsequent proceedings. In overcoming the presumption for issuing a summons rather than a warrant, the prosecuting attorney may, among other factors, cite to the nature and circumstances of the particular case, the past history of response to legal process and the defendant's criminal record. The remedy of a defendant who has been arrested by warrant is to request the imposition of conditions of release under Rule 6.02, subd. 1 upon the initial court appearance.

By Rule 3.01 the warrant shall be issued to any person authorized by law to execute a warrant. (See Rule 3.03, subd. 1 for service of a summons by any officer authorized by law to execute a warrant.) (For authorized persons and officers, see Minn. Stat. § 488.11 (1971) (municipal courts not in county court districts); Minn. Stat. §§ 487.25, 633.035 (1971) (county courts and justices of the peace); Minn. Stat. § 488A.06 (1971) (Municipal Court of Hennepin County); Minn. Stat. § 488A.27, subd. 12 (1971) (Municipal Court of St. Paul); Minn. Stat. § 629.30 (1971) (peace officers); Minn. Stat. § 411.27 (1971) (cities of the fourth class); Minn. Stat. §§ 412.61, 412.861 (villages).)

The provision of Rule 3.01 that if an individual defendant fails to appear in response to a summons, a warrant shall issue follows F.R.Crim.P. 4(a).

Rule 3.02, subd. 1 prescribing the contents of a warrant follows the language of F.R.Crim.P. 4(b)(1), with the added provision that the warrant and complaint may be combined in one form. This is the present practice in the Municipal Court of Hennepin County. (See also Wis. Stat.§ 968.04, subd. 3(a)(8)). This rule also provides that conditions of release may be endorsed on the warrant. If so endorsed, the defendant should be released on meeting those conditions. In all cases, the issuing officer must set and endorse on the warrant the amount of bail which the defendant may pay to obtain release. Upon payment to the jailer of the bail so set, the defendant should be released pending court appearance. The officers authorized to issue warrants or summons are the same as those authorized to issue complaints. See Rule 2.01 and the comments thereon as to those officers so authorized. Clerks or deputy clerks of court are authorized to issue a summons only for offenses which are punishable, upon conviction, by a fine. This is constitutionally permissible under Shadwick v. City of Tampa, 407 U.S. 345, 92 S. Ct. 2119 (1972) and is presently authorized under Minn. Stat. § 629.42 (1971); Minn. Stat. § 488.17, subd. 6 (1971) (Municipal Courts outside of Hennepin County and St. Paul which are not part of the County Court system); Minn. Stat. § 488A.10, subd. 7 (1971) (Hennepin County Municipal Court); and 488A.27, subd. 7 (1971) (St. Paul Municipal Court). The clerk or deputy clerk, however, may not issue warrants for any offense.

The words "issuing officer" in Rules 3.01 and 3.02, subd. 1, refer to the judge or judicial officer who issues process upon the complaint and does not refer to the arresting officer. Rule 3.02, subd. 2 sets forth the directions the warrant shall contain for the time of the defendant's first court appearance after arrest.

Present Minnesota law requires that the defendant be taken before the court "without unreasonable delay" (See e.g., Stromberg v. Hansen, 177 Minn. 307, 225 N.W. 148 (1929); See also Minn. Stat. §§ 629.42, 629.401 (1971).) F.R.Crim.P. 5(a) contains a similar provision.

Rule 3.02, subd. 2 imposes more definite time limitations while permitting a degree of flexibility.

The first limitation (Rule 3.02, subd. 2(1)) is that if the court which issued the warrant is in session when the defendant is arrested, the defendant shall be brought promptly before that court. The 36-hour time period provided by Rule 3.02, subd. 2(2) is not applicable to this first limitation under Rule 3.02, subd. 2(1). Ordinarily the defendant shall be brought directly before the court if it is in session.

The second limitation (Rule 3.02, subd. 2(2)) is that if the court which issued the warrant is not then in session, the defendant shall be taken before the nearest available judge or judicial officer of the issuing court without unnecessary delay, but in any event not more than 36 hours after the arrest or as soon after the 36-hour period as a judge or judicial officer of the issuing court is available. (This rule changes Minn. Stat. § 629.46 (1971) in that it does not require that the defendant be brought before a judge or judicial officer of the issuing court in the county from which the warrant was issued. The rule requires only that the defendant be brought before a judge or judicial officer of the issuing court.)

This second limitation (Rule 3.02, subd. 2(2)) does not provide an automatic 36-hour period during which the defendant may be held without a court appearance. It is the intention of the rule that the defendant be brought before a proper judge or judicial officer as soon as one becomes available within the 36 hours. The rule recognizes, however, that there may be unusual circumstances in which a proper judge or judicial officer may not become available within that period and provides for that contingency.

In computing the 36-hour time limit in Rule 3.02, subd. 2(2), the day of arrest is not to be counted. The 36 hours begin to run at midnight following the arrest. Also, Rule 34.01 expressly does not apply to Rule 3.02, subd. 2(2). Saturdays, Sundays, and legal holidays, therefore, are to be counted in computing the time limit under this rule.

Rule 3.02, subd. 3 prescribing the form of summons follows substantially F.R.Crim.P. 4(b)(2) except that Rule 3.02, subd. 3 requires that the summons shall be accompanied with a copy of the complaint. Failure to attach a copy of the complaint does not constitute a jurisdictional defect. (See Hetland and Adamson, Minnesota Practice (1970), Comments, Minn.R.Civ.P. 3.02, pp. 228, 229.)

Under Rule 3.03, subd. 1, a warrant may be executed by any officer authorized by law (See Comment to Rule 3.01) (See also F.R.Crim.P. 4(c)(1)), and a summons may be served by any officer authorized to serve a warrant except that a summons may be served by mail by the clerk or deputy clerk of the issuing court. (F.R.Crim.P. 4(c)(1) provides that a summons may be served by anyone authorized to serve a summons in a civil action. It was the opinion of the Advisory Committee that criminal process should be served by someone in an official court-connected capacity.)

The provisions of Rule 3.03, subd. 2 that a warrant may be executed or a

summons served at any place within the State is in accord with existing law governing service of criminal process (Minn. Stat. §§ 629.40- 629.43, 488.05, subd. 3, 488A.01, subd. 8, 488A.18, subd. 9, 487.22). The phrase "except where prohibited by law" was added to exclude those places, such as federal reservations, where state service of process may be prohibited by law.

Rule 3.03, subd. 3 provides that the warrant shall be executed by arresting the defendant. The prohibition against an arrest on Sunday or between the hours of 10:00 p.m. and 8:00 a.m. unless expressly authorized on the warrant adopts Minn. Stat. § 629.31 (1988). The exigency requirement for permitting an arrest during the proscribed time is in addition to and not in conflict with the statute and is in accord with the historical practice. The minor nature of misdemeanors should not ordinarily justify an arrest during the proscribed period of time. The issuing officer may not, therefore, give blanket authorization on the warrant for all such arrests, but rather shall endorse the authorization on the warrant only when such an arrest is required by exigent circumstances.

Otherwise, the time and manner of making the arrest is left to existing statutory law. (See Minn. Stat. §§ 629.31 (as to time in the case of felonies and gross misdemeanors), 629.32, 629.33 (1971) (as to manner).) The provision of Rule 3.03, subd. 3 that the arresting officer need not have the warrant in possession is in accord with Minn. Stat. § 629.32 (1971). The provision that the defendant shall be informed of the existence of the warrant and of the charge follows F.R.Crim.P. 4(c)(3). In Rule 3.03, subd. 3 there is no specific requirement as in Minn. Stat.§ 629.32 (1971) and F.R.Crim.P. 4(c)(3) that the defendant be shown the warrant upon request as soon as possible. When brought promptly before a judge or judicial officer following arrest the warrant and complaint will be available to the defendant.

The provision of Rule 3.03, subd. 3 that summons may be served by mail follows ABA Standards, Pre-Trial Release, 3.4 (Approved Draft, 1968), F.R.Crim.P. 4(3), and ALI Model Code of Pre-Arraignment Procedure, § 120.4 (Proposed Official Draft # 1, 1972). The provision for personal or substituted service comes from F.R.Crim.P. 4(c)(4).

For service of summons on corporations Rule 3.03, subd. 3 adopts the method prescribed by law for service of process in civil actions. (See Minn.R.Civ.P. 4.03(c)).

Rule 3.03, subd. 4 providing for proof of the execution of a warrant or service of a summons to be made by the certificate of the officer executing the warrant or serving the summons is taken from F.R.Crim.P. 4(c)(4) as is the provision for execution or service of an unexecuted warrant or unserved summons.

Rule 3.04, subd. 1 permitting an amendment of a warrant or summons for defects in form is taken from Uniform Rules of Criminal Procedure 5(e)(1) (approved 1952).

Rule 3.04, subd. 2 adopts the substance of Uniform Rules of Criminal Procedure 5(e)(2) (approved 1952). This rule permits the court to continue any pretrial proceedings to enable the prosecuting attorney to file a new complaint when a motion is made for that purpose upon any of the grounds specified in the rule, and contemplates that if the proceedings are continued the prosecuting attorney shall move promptly to file a new complaint. For similar provisions see Rule 11.05 (Amendment of Complaint at Omnibus Hearing), Rule 17.05 (Amendment of Indictment or Complaint), and Rule 17.06, subd. 4

(Effect of Determination of Motion to Dismiss an Indictment or Complaint).

Rule 4. Procedure upon Arrest under Warrant Following a Complaint or Without a Warrant

Rule 4.01 Arrest Under Warrant

A defendant arrested under a warrant issued upon a complaint shall be taken before a court, judge or judicial officer as directed in the warrant.

Comment—Rule 4

See comment following Rule 4.03.

Rule 4.02 Arrest Without a Warrant

Following an arrest without a warrant:

Subd. 1. Release by Arresting Officer. If the arresting officer or the officer's superior determines that further detention is not justified, such officer or the officer's superior shall immediately release the arrested person from custody.

Subd. 2. Citation. The arresting officer or the officer's superior may issue a citation to and release the arrested person as provided by these rules, and must do so if ordered by the prosecuting attorney or by a judge or judicial officer of the district court of the county where the alleged offense occurred or by any person designated by the court to perform that function.

Subd. 3. Notice to Prosecuting Attorney. As soon as practical after the arrest, the arresting officer or the officer's superior shall notify the prosecuting attorney of the arrest.

Subd. 4. Release by Prosecuting Attorney. The prosecuting attorney may order the arrested person released from custody.

Subd. 5. Appearance Before Judge or Judicial Officer.

(1) Before Whom and When. An arrested person who is not released pursuant to this rule or Rule 6, shall be brought before the nearest available judge of the district court of the county where the alleged offense occurred or judicial officer of such court. The defendant shall be brought before such judge or judicial officer without unnecessary delay, and in any event, not more than 36 hours after the arrest, exclusive of the day of arrest, Sundays, and legal holidays, or as soon thereafter as such judge or judicial officer is available. Provided, however, in misdemeanor cases, a defendant who is not brought before a judge or judicial officer within the 36-hour limit, shall be released upon citation as provided in Rule 6.01, subd. 1.

(2) Complaint Filed; Order of Detention; Felonies and Gross Misdemeanors Not Charged as Designated Gross Misdemeanors Under Rule 1.04(b). At or before the time of the defendant's appearance as required by Rule 4.02, subd. 5(1), a complaint shall be presented to the judge or judicial officer referred to in Rule 4.02, subd. 5(1) or to any

judge or judicial officer authorized to issue criminal process upon the offense charged in the complaint. The complaint shall be filed forthwith except as provided by Rule 33.04 and an order for detention of the defendant may be issued, provided (1) the complaint contains the written approval of the prosecuting attorney or the certificate of the judge or judicial officer as provided by Rule 2.02; and (2) the judge or judicial officer determines from the facts set forth separately in writing in or with the complaint and any supporting affidavits or supplemental sworn testimony that there is probable cause to believe that an offense has been committed and that defendant committed it. Otherwise, the defendants shall be discharged, the complaint and any supporting papers shall not be filed, and no record made of the proceedings.

(3) Complaint or Tab Charge; Misdemeanors; Designated Gross Misdemeanors. If there is no complaint made and filed by the time of the defendant's first appearance in court as required by this rule for a misdemeanor charge or a gross misdemeanor charge for those offenses designated under Rule 1.04(b), the clerk shall enter upon the records a tab charge as defined in Rule 1.04(c) of these rules. However, in a misdemeanor case, if the judge orders, or if requested by the person charged or defense counsel, a complaint shall be made and filed. In a designated gross misdemeanor case commenced by a tab charge, the complaint shall be made, served and filed within 48 hours of the defendant's appearance on the tab charge if the defendant is in custody or within 10 days of the defendant's appearance on the tab charge if the defendant is not in custody, provided that in any such case the complaint shall be made, served and filed before the court accepts a guilty plea to any designated gross misdemeanor. Service of such a gross misdemeanor complaint shall be as provided by Rule 33.02 and may include service by U.S. mail. In a misdemeanor case, the complaint shall be made and filed within 48 hours after the demand therefor if the defendant is in custody or within thirty (30) days of such demand if the defendant is not in custody. If no valid complaint has been made and filed within the time required by this rule, the defendant shall be discharged, the proposed complaint, if any, and any supporting papers shall not be filed, and no record shall be made of the proceedings. A complaint is valid when it (1) complies with the requirements of Rule 2, and (2) the judge has determined from the complaint and any supporting affidavits or supplemental sworn testimony that there is probable cause to believe that an offense has been committed and that the defendant committed it. Upon the filing of a valid complaint in a misdemeanor case, the defendant shall be arraigned. When a charge has been dismissed for failure to file a valid complaint and a valid complaint is thereafter filed, a warrant shall not be issued on that complaint unless a summons has been issued first and either could not be served, or, if served, the defendant failed to appear in response thereto.

Comment—Rule 4

See comment following Rule 4.03.

Rule 4.03 Probable Cause Determination

Subd. 1. Time Limit. When a person arrested without a warrant is not earlier released pursuant to this rule or Rule 6, a judge or judicial officer shall make a probable cause determination without unnecessary delay and in any event within 48 hours from the time of the arrest including the day of arrest, Saturdays, Sundays and legal holidays. If the Court determines that probable cause does not exist or if there is no determination as to probable cause within the time as provided by this rule, the person shall be released

immediately.

Subd. 2. Application and Record. The facts establishing probable cause to believe that an offense has been committed and that the person arrested committed it shall be submitted upon oath either orally or in writing. The oath shall be administered by the judge or judicial officer for any facts submitted orally and may also be administered by the clerk or deputy clerk of court or notary public for any facts submitted in writing. Any oral testimony shall be recorded by reporter or recording instrument and shall be retained by the judge or judicial officer or by the judge's or judicial officer's designee. Any written or oral facts or other information submitted upon oath to establish probable cause may be made or taken by telephone, facsimile transmission, video equipment or similar device at the discretion of the reviewing judge or judicial officer. The person requesting a probable cause determination shall advise the reviewing judge or judicial officer of any prior request for a probable cause determination on this same incident or of any prior release of the arrested person on this same incident for failure to obtain a probable cause determination within the time limit as provided by this rule.

Subd. 3. Prosecuting Attorney. No request for determination of probable cause may proceed without the approval, in writing or orally on the record, of the prosecuting attorney authorized to prosecute the matter involved, or by affirmation of the applicant upon the application that the applicant has contacted the prosecuting attorney and the prosecuting attorney has approved the request, or unless the judge or judicial officer reviewing probable cause certifies in writing that the prosecuting attorney is unavailable and the determination of probable cause should not be delayed. If, in the discretion of the prosecuting attorney, a complaint complying with Rule 2 is obtained within the time limit provided by this rule, it shall not be necessary to obtain any further determination of probable cause under this rule to justify continued detention of the defendant.

Subd. 4. Determination. Upon the information presented, the Court shall determine whether there is probable cause to believe that an offense has been committed and that the person arrested committed the offense. If probable cause is found, the Court may set bail or other conditions of release or release the arrested person without bail pursuant to Rule 6. If probable cause is not found, the arrested person shall be released immediately. The determination of the Court shall be in writing and shall indicate whether probable cause was found, and, if so, for what offense, whether oral testimony was received concerning probable cause, and the amount of any bail or other conditions of release which the Court may have set. A written notice of the Court's determination shall be provided to the arrested person forthwith.

Comment—Rule 4

By Rule 4.01 a defendant arrested following a complaint shall be dealt with as directed by Rule 3.02, subd. 2.

Rule 4.02, subd. 1 directs an officer who makes an arrest without a warrant or the officer's superior to release the arrested person before the initial appearance in court without proceeding further, if the officer determines that further detention is not justified. This might occur when, for example, further investigation disclosed to the satisfaction of the officer that the defendant did not commit the offense for which arrested. (See similar provisions in ALI Model Code of Pre-Arraignment Procedure, § 120.9(2) (Proposed Official Draft # 1, 1972), Wis.Stat. § 968.08).

Rule 4.02, subd. 4 similarly authorizes the prosecuting attorney to order the release of a person arrested without a warrant without proceeding further. This would occur, for example, if the prosecuting attorney decides not to file a complaint.

Rule 4.02, subd. 3 provides that the prosecuting attorney shall be notified of an arrest without a warrant as soon as practical in order to determine whether to continue the prosecution and if so, to draw a complaint.

Rule 4.02, subd. 2 provides that the officer arresting without a warrant or the officer's superior may issue a citation as provided by Rule 6.01 and must do so if ordered by the prosecuting attorney or by a judge or judicial officer described in the rule.

Rule 4.02, subd. 5(1) prescribing the time within which a person arrested without a warrant shall be first brought before the court recognizes that additional time is needed to determine whether to continue the prosecution and to draw the complaint. So there is no requirement that the defendant be brought promptly before the appropriate court after arrest if the court is in session, but it is necessary under Rule 4.02, subd. 5(1) that the defendant be brought before such court without "unnecessary delay". (Compare Rule 3.02, subd. 2.) The 36-hour period does not include the day of arrest, Sundays, or legal holidays. Otherwise the intent of Rule 4.02, subd. 5(1) and Rule 3.02, subd. 2 is the same, namely, that the 36-hour period is not an automatic holding period and that the defendant shall be brought before the court at the earliest possible time within the period. In exceptional cases, however, the prosecuting attorney shall not be precluded by this section from seeking relief pursuant to Rule 34.02. The effect of failure to comply with Rules 4.02, subd. 5(1) and 3.02, subd. 2 on the admission of confessions or other evidence or on the jurisdiction of the court is left to case-by-case development. In State v. Wiberg, 296 N.W.2d 388 (Minn.1980) the Supreme Court held that violation of the time limits set forth in Rule 4.02, subd. 5(1) does not require the automatic exclusion of statements made which have a reasonable relationship to the violation. Rather, the admissibility of the statements depends on such factors as the reliability of the evidence, the length of the delay, whether the delay was intentional, and whether the delay compounded the effects of other police misconduct. In Wiberg the Supreme Court found a violation of Rule 4.02, subd. 5(1) even though 36 hours had not yet elapsed exclusive of the day of arrest. The court noted that such unexplained delays as occurred in Wiberg should weigh heavily in the trial court's determination of whether to exclude any statements. For the application of this same suppression test to identification evidence see Meyer v. State, 316 N.W.2d 545 (Minn.1982).

Where the defendant agrees, Rule 4.02, subd. 5(3) provides the procedure for initiating misdemeanor proceedings or designated gross misdemeanor proceedings as defined in Rule 1.04(b) without the necessity of issuing a complaint or obtaining an indictment as is required for felonies and other gross misdemeanors. This is provided to avoid the unnecessary delay for a defendant and to aid a prosecutor in those cases where the defendant may not even desire a complaint if sufficiently informed in some other way of the charges. When a defendant first appears in court following a warrantless arrest in such cases, the clerk shall enter on the records a brief statement (tab charge) of the offense charged, including a citation to the statute, ordinance, rule, regulation or provision of law which the defendant is alleged to have violated. This statement shall be a substitute for the complaint and is sufficient to initiate the proceedings in such cases under Rule 10.01 unless the defendant, defense counsel or the court requests, in

misdemeanor cases, that a complaint be filed and provided that in gross misdemeanor proceedings under Minn. Stat. § 169.121 or Minn. Stat. § 169.129 the complaint must be made, served and filed within the time limits as specified unless the defendant has entered a guilty plea before then. This provision for tab charges is substantially consistent with present Minnesota law for misdemeanors although under the present statutes the right to a complaint varies from court to court. See Minn. Stat. § 487.25, subd. 4, and Minn. Stat. § 488A.10, subd. 4 (In the county courts and in Hennepin County Municipal Court, a tab charge is sufficient unless the judge orders or the defendant requests a complaint); Minn. Stat. § 488A.27, subd. 4 (In St. Paul a tab charge is sufficient unless the judge orders a complaint); and Minn. Stat. § 488.17, subd. 4 (In any other municipal court the tab charge is sufficient where the defendant is in custody when appearing before the court, unless the court orders a complaint).

*Rule 4.02, subd. 5(3) permits the use of a tab charge to initiate a prosecution for a designated gross misdemeanor charged under Minn. Stat.§ 171.24, Minn. Stat. § 169A.20, Minn. Stat. § 169A.25, or Minn. Stat. § 169A.26. Rule 1.04(b) defines designated gross misdemeanor. The provisions concerning tab charges were extended to gross misdemeanor driving while impaired proceedings because of concern that such proceedings will not otherwise be prosecuted and completed promptly. When the rules were originally promulgated, there were few gross misdemeanor prosecutions. Due primarily to Minn. Stat. §§ 169.121 and 169.129 and their successor statutes, Minn. Stat. §§ 169A.20, 169A.25, and 169A.26, the number of gross misdemeanor prosecutions has increased tremendously. Unfortunately, prosecutorial resources have not increased proportionately and in some jurisdictions prosecutions for gross misdemeanor driving while intoxicated have been delayed substantially pending issuance of complaints. The use of the tab charges should get such cases into court promptly. However, the complaint must be made, served and filed within the time limits as specified in the rule. The rule further requires that prior to acceptance of a guilty plea to a designated gross misdemeanor, a complaint must be made, served and filed. This requirement is included because of concern that a case should be reviewed by a prosecutor before acceptance of a guilty plea to an offense for which a defendant, particularly a pro se defendant, could receive a sentence of imprisonment of up to one or two years. All other non-designated gross misdemeanors must be charged initially by complaint or indictment as required by Rules 4.02, subd. 5(2) and 17.01. Except for the use of the tab charge, the procedure for designated gross misdemeanor prosecutions is the same as for gross misdemeanor prosecutions under any other statute. Under the rule the defendant need not be required to personally appear in court to receive the complaint when it is later issued. Service could be made by mail on the defendant or defense counsel as appropriate. The defendant could be arraigned on the complaint at the next court appearance after the filing and service of the complaint. That next court appearance could be under Rule 8 or at the omnibus hearing under Rule 11 if the Rule 5 and **8** appearances were consolidated under Rule 5.03 with the consent of the defendant. If no valid complaint is filed as required by the rules, the proceedings are dismissed. See Rule 17.06 subd. 4(3) as to any restrictions or bars on further prosecution after such a dismissal.*

Under Rule 5.01 a defendant must be advised of the right to demand a complaint. It is anticipated that complaints will be requested by defendants in only a small percentage of misdemeanor cases because discovery is permitted under Rule 7.03, and most defendants will not wish to make an additional appearance to receive the complaint.

If a complaint is required under this rule in a misdemeanor case, the prosecutor

must file a valid complaint within 48 hours if the defendant is in custody or within 30 days if the defendant is not in custody or the tab charge must be dismissed. A longer time limit than 48 hours for those defendants in custody would encourage defendants who are in jail pending issuance of a complaint to waive that right in order to speed up the disposition of the charges. Time limits, of course, can be waived by a defendant. A defendant who is not in custody, may wish to request a later time to receive the complaint, for the defendant's convenience and that of the defense counsel and the prosecutor.

A complaint to be valid must comply with the requirements of Rule 2 and the issuing officer must have made a determination of probable cause.

Where a charge has been dismissed by the court for failure of the prosecutor to file a valid, timely complaint (Rule 4.02, subd. 5(3)) as required and the prosecutor subsequently files a valid complaint, a summons must be issued instead of a warrant. If it is impossible to locate the defendant to serve the summons or if the defendant fails to respond to the summons, a warrant may be issued. (See also Rule 3.01). This restriction is considered justified since it is unfair to subject a defendant to a possibly unnecessary arrest when the defendant has appeared in court once to answer the minor charge, and, through no fault of the defendant, a complaint was not issued at that time.

Where the tab charge has been dismissed for failure to file a valid, timely complaint as required, the prosecutor must file a valid complaint within the time specified by Rule 17.06, subd. 4(3) or any further prosecution is barred if so ordered by the court.

When a valid complaint has been filed or waived, defendant will be arraigned pursuant to Rule 5.

Rule 4.02, subd. 5(2) provides that on or before the first appearance of a person arrested without a warrant a complaint shall be filed provided it has the written approval of the prosecuting attorney or the certificate of the court as provided in Rule 2.02 and the judge or judicial officer has made a finding of probable cause. Otherwise the defendant shall be discharged. The rule is not intended to cover the effect of the discharge on subsequent prosecution for the same offense or conduct. (See State v. Uglum, 175 Minn. 607, 222 N.W. 280 (1928).)

Rule 4.02, subd. 5(2) permits the complaint to be presented either to the judge or judicial officer before whom the defendant will appear or to any judge or judicial officer authorized to issue a warrant of arrest upon the complaint. If the judge or judicial officer to whom the complaint is presented determines that there is probable cause to believe that defendant committed the offense charged, the complaint shall be filed, and in lieu of a warrant of arrest (which is the present practice), an order for detention of the defendant pending further proceedings shall be issued.

Rule 4.03 is based upon the constitutional requirement as set forth in County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 114 L.Ed.2d 49 (1991) for a prompt judicial determination of probable cause following a warrantless arrest. Pursuant to that case and Rule 4.03, subd. 1, the determination must occur without unreasonable delay and in no event later than 48 hours after the arrest. There are no exclusions in computing the 48-hour time limit; Rule 34.01 does not apply. Even a

probable cause determination within 48 hours will be too late if there has been unreasonable delay in obtaining the determination. "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." County of Riverside v. McLaughlin, 500 U.S. 44, 111 S.Ct. 1661, 1670, 114 L.Ed.2d 49 (1991). The requirements of Rule 4.03 are in addition to the requirements of Rule 4.02 that a person arrested without a warrant be brought before a judge or judicial officer within 36 hours after the arrest exclusive of the day of arrest, Sundays and legal holidays. Because of the exclusions permitted in computing time under the "36-hour rule", compliance with that rule will not assure compliance with the "48-hour rule". However, if a defendant does appear in court within the time limits of the "48-hour rule" as well as the "36-hour rule" and a valid complaint is then issued, Rule 4.03 is satisfied and no further determination of probable cause is necessary.

The "48-hour rule" also applies to all misdemeanor cases. For gross misdemeanors prosecuted as "designated gross misdemeanors" as defined by Rule 1.04(b) and for misdemeanors, Rule 4.02, subd. 5(3) requires only that a tab charge be entered on the records at the time of a defendant's appearance in Court within the "36-hour rule". A complaint may be issued at that time but is not then required and Rule 4.02, subd. 5(3) governs when and if a complaint is subsequently required. However, the requirements of Rule 4.03 still apply and, even if not requested by a defendant, there must be a judicial determination of probable cause within 48 hours of an arrest and detention or the arrested person must be released whether the offense involved is a felony, gross misdemeanor, or misdemeanor. Rule 6.01 provides for the mandatory and permissive issuance of citations and an arrested person released on citation prior to the 48-hour time limit need not receive a probable cause determination pursuant to Rule 4.03.

Release of an arrested person pursuant to Rule 4.03, subd. 1 because of a determination that probable cause does not exist, or because no determination is made within the specified time limit, doe not prevent later prosecution for the offense involved or arrest for a different incident. However, it is not permissible to attempt to extend the time limit of the rule by releasing and then rearresting an individual without a warrant without additional facts to establish probable cause. As it is for the "36-hour rule" these rules do not provide sanctions for violation of the "48-hour rule". That is left to case law development. See State v. Wiberg, 296 N.W.2d 388 (Minn.1980) as to the possible suppression of evidence for violation of the "36-hour rule".

Under Rule 4.03, subd. 2 the facts submitted to the court to establish probable cause may be either by written affidavit or sworn oral testimony. See Form 44, Application for Judicial Determination of Probable Cause to Detain, following these rules. If oral testimony is submitted, the oath shall be administered by the judge or judicial officer, but may be done by telephone, facsimile transmission, video equipment or similar device in the discretion of the reviewing judge or judicial officer. As of May, 1992, the only judicial officer in Minnesota serves in St. Louis County pursuant to Minn. Stat. § 487.08. See Rule 33.05 as to use of facsimile transmission generally. Any written affidavits submitted may be sworn to before a clerk or deputy clerk of court or notary public as well as before the reviewing judge or judicial officer. The procedure for obtaining the probable cause determination is similar to that for obtaining a complaint under Rule 2 and no appearance by the arrested person is required.

Under Rule 4.03, subd. 3 the prosecuting attorney's written or oral approval is

necessary in the probable cause proceedings. However, as for complaints under Rule 2.02, the court may proceed without such approval upon certifying in writing that the prosecuting attorney is unavailable and the determination of probable cause should not be delayed. Instead of obtaining a probable cause determination under Rule 4.03, the prosecuting attorney has the option of obtaining a complaint complying with Rule 2 within the time limit provided by Rule 4.03. If that is done, the time for the defendant's appearance before the judge or judicial officer is still governed by the "36-hour" provision of Rule 4.02.

Rule 4.03, subd. 4, sets forth the elements to be included in the court's written determination of probable cause. See Form 45, Judicial Determination of Probable Cause to Detain, following these rules. If need not contain a recitation of the facts upon which the court's determination was based. The court may set bail or other conditions of release. If the court sets conditions other than money bail on which the defendant may be released, the court shall also fix the amount of money bail without other conditions upon which the defendant may obtain release. See Rule 6.01, subd. 1 and the comments to that rule. The arrested person must be provided with a written notice of the court's determination forthwith. See Form 46, Notice of Judicial Determination of Probable Cause to Detain, following the rules. It is not necessary that the actual determination or a copy of it be provided to the arrested person forthwith. That may be difficult or impossible in some cases, particularly if the telephone or other electronic means were used in obtaining the determination. The written notice containing the elements of the determination may be prepared by someone other than the reviewing judge or judicial officer. See Minn. Stat. § 611.32, subd. 2 and State v. Mitjans, 408 N.W.2d 824 (Minn.1987) as to the obligation of a law enforcement officer, with the assistance of an interpreter, to explain to an arrested person handicapped in communication all charges filed against the person and all procedure relating to the person's detainment and release. It is not necessary to forthwith provide the arrested person with any affidavits, transcribed testimony, or other materials submitted to the court upon the application for a probable cause determination. If prosecution is commenced, those materials may be obtained by the defendant later through discovery under Rule 9.01, subd. 1 for felonies and gross misdemeanors and under Rule 7.03 for misdemeanors. Otherwise, access to any such materials is governed by Minn. Stat. § 13.82 of the Minnesota government data practices act.

Rule 5. Procedure on First Appearance

Rule 5.01 Statement to the Defendant

A defendant arrested with or without a warrant or served with a summons or citation appearing initially before a judge or judicial officer, shall be advised of the nature of the charge. The court shall first determine whether the defendant is handicapped in communication. A defendant is handicapped in communication if, (a) because of either a hearing, speech or other communications disorder, or (b), because of difficulty in speaking or comprehending the English language, the defendant cannot fully understand the proceedings or any charges made against the defendant or is incapable of presenting or assisting in the presentation of a defense. If a defendant is handicapped in communication, the judge or judicial officer shall appoint a qualified interpreter to assist the defendant throughout the proceedings. The proceedings at which a qualified interpreter is required are all those covered by these rules which are attended by the

defendant. A defendant who has not previously received a copy of the complaint, if any, and supporting affidavits and the transcription of any supplementary testimony, shall be provided with copies thereof. Upon motion of the prosecuting attorney, the court shall require that the defendant be booked, photographed, and fingerprinted. In felony cases, the defendant shall not be called upon to plead.

The judge, judicial officer, or other duly authorized personnel shall advise the defendant substantially as follows:

(a) That the defendant is not required to say anything or submit to interrogation and that anything the defendant says may be used against the defendant in this or any subsequent proceeding;

(b) That the defendant has a right to counsel in all subsequent proceedings, including police line-ups and interrogations, and if the defendant appears without counsel and is financially unable to afford counsel, that counsel will forthwith be appointed without cost to the defendant charged with an offense punishable upon conviction by incarceration;

(c) That the defendant has a right to communicate with defense counsel and that a continuance will be granted if necessary to enable defendant to obtain or speak to counsel;

(d) That the defendant has a right to a jury trial or a trial to the court;

(e) That if the offense is a misdemeanor, the defendant may either plead guilty or not guilty, or demand a complaint prior to entering a plea;

(f) That if the offense is a designated gross misdemeanor as defined in Rule 1.04(b) and a complaint has not yet been made and filed, a complaint must be issued within 10 days if the defendant is not in custody or within 48 hours if the defendant is in custody.

(g) That if the offense is a gross misdemeanor and the defendant has had an opportunity to consult with an attorney, the defendant may enter a plea of guilty in accordance with Rule 15.01.

The judge, judicial officer, or other duly authorized personnel may advise a number of defendants at once of these rights, but each defendant shall be asked individually before arraignment whether the defendant heard and understood these rights as explained earlier.

Comment—Rule 5

See comment following Rule 5.06.

Rule 5.02 Appointment of Public Defender

Subd. 1. Notice of Right to Counsel; Appointment of the Public Defender; Waiver of Counsel.

(1) Notice of Right to Counsel. If a defendant charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration appears without counsel, the court shall advise the defendant of the right to counsel and the appointment of the district public defender if the defendant has been determined to be financially unable to afford counsel. The court shall also advise the defendant of the right to request counsel at any stage of the proceedings.

(2) Appointment of the Public Defender. Upon the request of a defendant charged with a felony, gross misdemeanor, misdemeanor punishable by incarceration, exrtradition proceeding under section 629, or probation revocation proceeding, who is not represented by counsel and is financially unable to afford counsel, the judge or judicial officer shall appoint the public defender for the defendant. The court shall not appoint a district public defender to a defendant who is financially able to retain private counsel but refuses to do so.

(3) Waiver of Counsel, Misdemeanor. If a defendant appearing without counsel charged with a misdemeanor punishable upon conviction by incarceration does not request counsel and wishes to represent himself or herself, the defendant shall waive counsel in writing or on the record. The court shall not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights. The court may appoint the district public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

(4) Waiver of Counsel, Felony, Gross Misdemeanor. If a defendant appearing without counsel charged with a felony or gross misdemeanor does not request counsel and wishes to represent himself or herself, the court shall ensure that a voluntary and intelligent written waiver of the right to counsel is entered in the record. If the defendant refuses to sign the written waiver form, the waiver shall be made orally on the record. Prior to accepting any waiver, the trial court shall advise the defendant of the following: the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments, that there may be defenses, that there may be mitigating circumstances, and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel. The court may appoint the district public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

Subd. 2. Appointment of Advisory Counsel. The court may appoint "advisory counsel" to assist the accused who voluntarily and intelligently waives the right to counsel.

(1) If the court appoints advisory counsel because of its concerns about fairness of the process, the court shall so state on the record. The court shall, on the record then, advise the defendant and counsel so appointed that the defendant retains the right to decide when and how the defendant chooses to make use of advisory counsel and that the decision on what type of role advisory counsel is permitted may affect a later request to allow advisory counsel to assume full representation of the accused.

(2) If the court appoints advisory counsel due to its concerns about delays in completing the trial because of the potential disruption by the defendant or because of the complexity or length of the trial, the court shall so state on the record. The court shall on the record then advise the defendant and counsel so appointed that advisory counsel will assume full representation of the accused if (a) the defendant becomes so disruptive during the proceedings that such conduct is determined to constitute a waiver of the right of self representation or (b) the defendant requests advisory counsel to take over

representation during the proceeding.

Advisory counsel must be present in the courtroom during all proceedings in the case and must be served with all documents which must be served upon an attorney of record.

Subd. 3. Standards for District Public Defense Eligibility. A defendant is financially unable to obtain counsel if:

(1) The defendant, or any dependent of the defendant who resides in the same household as the defendant, receives means-tested governmental benefits; or

(2) The defendant, through any combination of liquid assets and current income, would be unable to pay the reasonable costs charged by private counsel in that judicial district for a defense of the same matter.

Subd. 4. Financial Inquiry. An inquiry to determine financial eligibility of a defendant for the appointment of the district public defender shall be made whenever possible prior to the court appearance and by such persons as the court may direct. This inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. In no case shall the district public defender be required perform this inquiry or investigate the defendant's assets or eligibility. The court has a duty to conduct a financial inquiry. The inquiry must include the following:

(1) the liquidity of real estate assets, including homestead;
(2) any assets that can readily be converted to cash or used to secure a debt;
(3) the value of all property transfers occurring on or after the date of the alleged offense;
(4) the determination of whether transfer of an asset is voidable as a fraudulent conveyance.

The burden is on the accused to to show that he or she is financially unable to afford counsel. Defendants who fail to provide the information necessary to determine eligibility shall be deemed ineligible.

Subd. 5. Partial Eligibility and Reimbursement. The ability to pay part of the cost of adequate representation at any time while the charges are pending against a defendant shall not preclude the appointment of the public defender for the defendant. The court, if after previously finding that the defendant is eligible for public defender services, determines that the defendant now has the ability to pay part of the costs, may require a defendant, to the extent able, to compensate the governmental unit charged with paying the expense of the appointed public defender.

Comment—Rule 5

See comment following Rule 5.06.

Rule 5.03 Date of Rule 8 Appearance in District Court; Consolidation of Appearances Under Rule 5 and Rule 8

If the defendant is charged with a felony or gross misdemeanor and has not

waived the right to a separate appearance under Rule 8 as provided in this rule, the judge or judicial officer shall set a date for such appearance before the district court having jurisdiction to try the offense charged in accordance with a schedule or other directive established by order of the district court, which appearance date shall not be later than fourteen (14) days after the defendant's initial appearance before such judge or judicial officer under Rule 5.

The defendant shall be informed of the time and place of such appearance and ordered to appear as scheduled. The time for appearance may be extended by the district court for good cause.

Notwithstanding any rule to the contrary, in felony and gross misdemeanor cases, the defendant may be permitted to waive the separate appearance otherwise required by this rule and Rule 8. Any such waiver shall be made either in writing or orally on the record in open court. If a separate appearance under Rule 8 is waived by the defendant, all of the functions and procedures provided for by both Rule 5 and Rule 8 shall take place at the one consolidated appearance.

Comment—Rule 5

See comment following Rule 5.06.

Rule 5.04 Plea in Misdemeanor Cases

Subd. 1. Entry of Plea. When a valid complaint has been made and filed, or a brief statement entered on the record as authorized under Rule 4.02, subd. 5(3), the defendant shall be called upon to plead or be given time to plead. The arraignment shall be conducted in open court. A defendant may appear by counsel and a corporation shall appear by counsel or by a duly authorized officer.

Subd. 2. Guilty Plea; Offenses From Other Jurisdictions. If the defendant enters a plea of guilty, the presentencing and sentencing procedures provided by these rules shall be followed. Following a plea of guilty, the defendant may request permission to plead guilty to other misdemeanor offenses committed within the jurisdiction of other courts in the state pursuant to Rule 15.10.

Subd. 3. Not Guilty Plea and Jury Trial. If the defendant enters a plea of not guilty to a charge on which entitled to a jury trial, the defendant shall be asked to exercise or waive that right. The defendant may waive jury trial either personally in writing or orally on the record in open court. If the defendant fails to waive or demand a jury trial, a jury trial demand shall be entered in the record.

Subd. 4. Demand or Waiver of Evidentiary Hearing. If the defendant pleads not guilty and a notice of evidence and identification procedures has been given by the prosecution as required by Rule 7.01, the defendant and the prosecution shall each either waive or demand an evidentiary hearing as provided by Rule 12.04. Such demand or waiver may be made either orally on the record or in writing and shall be made at the first court appearance after the notice has been given by the prosecution.

Subd. 5. Special Appearances Abolished. Special appearances are abolished and any challenge to the personal jurisdiction of the court shall be decided as provided in

Rule 10.02.

Comment—Rule 5

See comment following Rule 5.06.

Rule 5.05 Bail or Release

The judge or judicial officer shall set and advise the defendant of the conditions under which the defendant may be released under these rules for appearance.

Comment—Rule 5

See comment following Rule 5.06.

Rule 5.06 Record

Minutes of the proceedings shall be kept unless the judge or judicial officer directs that a verbatim record thereof shall be made, and provided that any plea of guilty to an offense punishable by incarceration shall comply with the requirements of Rule 13.05 and Rule 15.09.

.Comment—Rule 5.

Rule 5 prescribes the procedure upon the defendant's initial appearance before a judge or judicial officer following an arrest with or without a warrant under Rules 3 and 4.01 or in response to a summons under Rule 3 or a citation under Rule 4.02, subd. 2. In most misdemeanor cases, the initial appearance will also be the time of arraignment and, often, the time of disposition as well.

Rule 5.01 sets forth the statements and advice to be given to the defendant upon the initial court appearance. Similar provisions appear in ABA Standards, Pre-Trial Release, 4.3 (Approved Draft, 1968), F.R.Crim.P. 5(c), and ALI Model Code of Pre-Arraignment Procedure § 310.1(4)(a) (T.D. # 5, 1972).

Rule 5.01 requires the appointment of a qualified interpreter for a defendant handicapped in communication. The rule requires that a qualified interpreter assist such a defendant in all procedures contemplated by these rules. This appointment is mandated by Minn. Stat. § 611.32, subd. 1 (1992). A person handicapped in communication is someone who due to a hearing, speech or other communications disorder, or lack of skill in English, is not able to fully understand the judicial proceedings or charges, or is incapable of presenting or assisting in the presentation of a defense. The definition contained in the rule is the same as that contained in Minn. Stat. § 611.31 (1992). Minn. Stat. § 611.33 (1992) should be referred to for the definition of qualified interpreter.

Rule 5.01 requires that the defendant be provided with copies of the complaint and any supporting affidavits and a copy of the transcript of any supplemental testimony. Ordinarily, the facts showing probable cause will be set forth separately in or with the complaint or in supporting affidavits or both, but in the unusual case when supplemental testimony is taken, the defendant shall be provided with a copy of the transcript as soon as it is available. Of course, in misdemeanor cases and in designated gross misdemeanor

cases as defined in Rule 1.04(b) where no complaint has been issued and prosecution is pursuant to a tab charge this requirement does not apply.

In misdemeanor cases this statement as to a defendant's rights may be combined with the questioning required under Rule 15.02 prior to acceptance of a guilty plea. In order to save time and avoid repetition, the judge or judicial officer may advise a number of defendants at the same time of these rights, but the statement must be recorded and each defendant upon approaching the court must be asked on the record whether the defendant has heard and understood the rights explained earlier.

The warning as to the defendant's right to counsel continues the requirements of Minn. Stat. §§ 611.15 and 630.10 (1971). (See St. Paul v. Whidby, 295 Minn. 129, 203 N.W.2d 823 (1972), recognizing that misdemeanors authorizing a sentence of incarceration are criminal offenses and criminal procedures must be followed.)

Pursuant to Rule 5.01(g), a defendant may plead guilty to a gross misdemeanor at the first appearance under Rule 5 in accordance with the guilty plea provisions of Rule 15.01. If that is done, the defendant must first have the opportunity to consult with an attorney. If the guilty plea is to a designated gross misdemeanor prosecuted by tab charge, it is necessary that a complaint be made, served, and filed before the court accepts the guilty plea. See Rule 4.02, subd. 5(3), and the comments to that rule. See also Rule 5.02, subd. 1(4), concerning waiver of the right to counsel. Rule 5.01(g) does not permit a defendant to enter a plea of not guilty to a gross misdemeanor at the first appearance under Rule 5. Rather, in accordance with Rules 8.01 and 11.10, a not guilty plea in felony and gross misdemeanor cases is not entered until the Omnibus Hearing or later.

Rule 5.02 governs the appointment of the public defender for indigent defendants (See ABA Standards, Pre-Trial Release, 4.2 (Approved Draft, 1968).)

The prior rule reflected a policy decision that all indigent defendants charged with felony or gross misdemeanor offenses would have counsel appointed for them. While the prior rule did not reflect the right of the defendant to waive counsel in felony and gross misdemeanor cases, the comments to the rule did acknowledge the right of defendants to represent themselves. Faretta v. California, 422 U.S. 806 (1975). The current rule includes language which makes this right clear. The decision in Faretta v. California found that it was permissible for the state to appoint counsel over the defendant's objection, to assist and consult if requested to do so by the defendant. The revised rule also sets forth standards for appointing "advisory counsel" in cases where the defendant waives counsel and the court believes it is appropriate to appoint "advisory counsel".

This rule contains the requirement that the court advise defendants appearing without counsel of their right to counsel, Minn. Stat. § 611.15, and the right "at any time" to request the appointment of the public defender. Minn. Stat. §611.16.

Faretta v. California recognized the constitutional right of the accused in a criminal proceeding to voluntarily and intelligently waive the right to counsel and represent himself or herself. In ensuring a voluntary and intelligent waiver, the court must warn the defendant of the "dangers and disadvantages of self-representation." The rule provides that when a defendant wishes to waive the right to counsel, the court must

ensure that the defendant makes a voluntary and intelligent waiver of counsel by conducting a penetrating and comprehensive examination of the defendant's understanding of the factors involved in this decision. The provision sets forth a minimum list of the factors to be considered. See Von Moltke v. Gillies, 332 U.S. 708 (1948).

Another way for the court to assure itself that the waiver of counsel is voluntary and intelligent is to appoint temporary counsel to advise and consult with the defendant as to the waiver. This is in accord with ABA Standards, Providing Defense Services, 5-7.3 (1980).

Minnesota law requires that a waiver of counsel be in writing unless the defendant refuses to sign the written waiver form. In that case a record of the waiver is permitted. Minn. Stat. §611.19. In practice, a Petition to Proceed As Pro Se Counsel may fulfill the dual requirements of providing the defendant with the information necessary to make a voluntary and intelligent waiver of the right to counsel as well as providing a written waiver. See Form 11. Also see Appendix C to Rule 15 for the Petition to Enter Plea of Guilty by Pro Se Defendant.

Faretta v. California also recognized that a state may, over the objection of the accused, appoint what has been called "standby counsel" to aid the accused if and when the accused requests help and to be available to represent the accused in the event termination of the defendant's self-representation is necessary because the defendant "deliberately engages in serious and obstructionist misconduct."

In most cases, the primary role of counsel appointed over the objection of the accused is fundamentally advisory. In fewer cases, the role of appointed counsel may be to take over representation of the defendant during trial either because of a request of the defendant because of the length or complexity of the trial, or because the defendant's disruptive behavior constituted a waiver of the right of self-representation. While Faretta refers to counsel taking representation upon termination of the right of self-representation, in most cases this is not the primary role of such counsel and may not be either feasible or desirable. The absolute control over the defense placed in the hands of the accused by Faretta may prevent appointed advisory counsel from being able to be ready to step in and continue the trial if the defendant is unable or unwilling to continue to represent himself or herself. The accused, not appointed counsel, controls the plan--or lack of plan--for the presentation of the defense. The term "standby counsel" is too broad a term to cover the role of appointed counsel in every case or even most cases where counsel is appointed over the objection of the defendant. Because the primary purpose of counsel appointed over the objection of the defendant is to help the accused understand and negotiate through the basic procedures of the trial and "to relieve the trial judge of the need to explain and enforce basic rules of [the] courtroom," counsel appointed over the objection of the accused may be more properly called "advisory counsel".

There appear to be two main reasons for appointing advisory counsel for defendants who wish to represent themselves: (1) the many concerns surrounding the fairness of a criminal process where lay people choose to represent themselves--to aid the court in fulfilling its responsibility for insuring a fair trial, to further the public interest in an orderly, rational trial, or if the court appoints advisory counsel to assist the pro se defendant--and (2) the concerns over the disruption of the criminal process prior to its completion caused by the removal of an unruly defendant or a request for counsel during a long or complicated trial.

These general reasons for the appointment of counsel to the pro se defendant suggest a natural expectation of the level of readiness of advisory counsel. If the court appoints advisory counsel as a safeguard to the fairness of the proceeding, it would not be expected that counsel would be asked to take over the representation of the defendant during the trial and counsel should not be expected and need not be prepared to take over representation should this be requested or become necessary. If this unexpected event occurred and a short recess of the proceeding were sufficient to allow counsel to take over representation, the court could enter that order. If the circumstances constituted a manifest injustice to continue with the trial, a mistrial could be granted and a date for a new trial, allowing counsel time to prepare, could be set. The court could also deny the request to allow counsel to take over representation if the circumstances would not make this feasible or practical.

If the court appoints advisory counsel because of the complexity of the case or the length of the trial or the possibility that the defendant may be removed from the trial because of disruptive behavior, advisory counsel must be expected to be prepared to take over as counsel in the middle of the trial so long as the interests of justice are served.

Whenever counsel is appointed over the defendant's objection, counsel's participation must not be allowed to destroy the jury's perception that the accused is representing himself or herself. In all proceedings, especially those before the jury, advisory counsel must respect the defendant's right to control the case and not interfere with it. The accused must authorize appointed counsel before the counsel can be involved, render impromptu advice, or ever appear before the court. If the accused does not wish appointed counsel to participate, counsel must simply attend the trial.

Even where appointed counsel is not expected to be ready to take over representation in the middle of the proceedings, it is appropriate and necessary that all advisory counsel be served with the same disclosure and discovery items as counsel of record so that counsel can at least be familiar with this information in acting in an advisory role. All counsel appointed for the pro se defendant must be served with the pleadings, motions, and discovery.

It is essential that at the outset the trial court explain to the accused and counsel appointed in these situations what choices the accused has and what the consequences of those choices may be later in the proceedings. In State v. Richards, 552 N.W.2d 197, 206 (Minn. 1996), the Supreme Court repeated the rule it set in State v. Richards, 463 N.W.2d 499 (Minn. 1990): the defendant's request for the "substitution of standby counsel (shall not be granted) unless, in the trial court's discretion, his request is timely and reasonable and reflects extraordinary circumstances." Trial courts should consider the progress of the trial, the readiness of standby counsel, and the possible disruption of the proceedings. Statement of the expectations of advisory counsel at the outset should make it clear to all concerned about what will happen should there be a change in the representation of the defendant during the proceeding.

A defendant appearing pro se with advisory counsel should be informed that the duties and costs of investigation, legal research, and other matters associated with litigating a criminal matter are the responsibility of the defendant and not advisory counsel. It should be made clear to the pro se defendant that advisory counsel is not a functionary of the defendant who can be directed to perform tasks by the defendant. A

motion pursuant to Minn. Stat. §611.21 is available to seek funds for hiring investigators and expert witnesses.

Rule 5.02, subd. 3 prescribes the standard to be applied by the court in determining whether a defendant is financially eligible for the appointment of the public defender. This standard is based upon the standards adopted by the Minnesota Legislature effective July 1, 2003, in Minn. Stat. § 611.27 (Supp. 2003) except that the statute expressly prohibits the appointment of the public defender as advisory counsel. This rule also recognizes the limited resources of district public defenders.

Under part (1), the defendant is eligible for public defender representation if they receive a means-tested government benefit or if they have a dependent who resides in their household and who receives such benefits. A means-tested benefit is one based upon an income and/or assets test.

Under part (2), the defendant is eligible for public defender representation if their income and/or assets are insufficient for them to pay the reasonable costs of private representation in that judicial district for a case of the nature at issue.

It is strongly recommended that the district court maintain a list of attorneys who wish to have cases referred to them and who are willing to try to make financial arrangements with defendants to permit them to accept representation. A number of organizations, including the Hennepin and Ramsey County Bar Associations and the Minnesota Association of Criminal Defense Lawyers, maintain lists of private attorneys who will accept criminal defense cases at a fee rate which will be determined after consideration of the defendant's ability to pay. The existence of such a referral list may not, however, be a basis for failing to appoint counsel for a defendant who is financially eligible for public defender representation under Parts (1) or (2) of this rule.

To assist the court in deciding whether to appoint the public defender, Rule 5.02, subd. 4 provides that whenever possible a financial inquiry should be conducted before the defendant's appearance in court. Such an inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. The rule also emphasizes the court's obligation to jealously guard the resources of district public defense and outlines the extent to which the court must go to determine district public defense eligibility in accordance with In re Stuart, 646 N.W.2d 520 (Minn. 2002). In order to avoid the creation of conflicts of interest and to focus limited public defender resources on client representation, the public defender shall not be permitted or required to participate in determining whether particular defendants are eligible for public defender representation.

Rule 5.02, subd. 5 provides that the ability of a defendant to pay part of the cost of adequate representation when charges are pending shall not preclude the court from appointing the public defender. This provision is included to make clear that the public defender can be appointed for the person of moderate means who would be subject to substantial financial hardship if forced to pay the full cost of adequate representation. In such circumstances the court may require the defendant to the extent able to compensate the governmental unit charged with paying the expense of the appointed public defender.

Rule 5.02, subd. 5 is in accord with ABA Standards, Providing Defense Services, 6.3 (Approved Draft, 1968) and with Minn. Stat. §611.20.

Under Rule 5.03, if the defendant is charged with a felony or gross misdemeanor, a date shall be fixed by the judge or judicial officer for the defendant's appearance in the district court under Rule 8, where the defendant will be arraigned upon the complaint or, where permitted, the tab charge (Rules 8.01, 12), and if a guilty plea is not entered, a date will be fixed by the district court (Rule 8.04) for the Omnibus Hearing provided for by Rule 11.

The date fixed by the judge or judicial officer (Rule 5.03) for the defendant's appearance before the district court under Rule 8 shall be not more than 14 days after the defendant's initial appearance (Rule 5), but the district court may extend the time for good cause (Rule 5.03). The judge or judicial officer shall set the date in accordance with a time schedule or other order or directive previously furnished or made by the district court (Rule 5.03).

In certain circumstances a separate appearance to fulfill the requirements of Rule 8 may serve very little purpose. Originally these rules required the appearance under Rule 5 to be in the county court and the appearance under Rule 8 to be in the district court. Now, both appearances are held in the district court. The additional time and judicial resources invested in a separate appearance under Rule 8 may yield little or no benefit. Therefore, Rule 5.03 permits the appearances required by Rule 5 and Rule 8 to be consolidated upon request of the defendant.

When the appearances are consolidated under Rule 5.03, all of the provisions in Rule 8 are applied to the consolidated hearing. This means that under Rule 8.04 the Omnibus Hearing provided for by Rule 11 must be scheduled for a date not later than 28 days after the consolidated hearing. This requirement is subject however to the power of the court under Rule 8.04(c) to extend the time for good cause related to the particular case upon motion of the defendant or the prosecution or upon the court's initiative. Also, the notice of evidence and identification procedures required by Rule 7.01 must be given at or before the consolidated hearing.

By Rule 5.04, after a complaint has been issued or a tab charge entered on the record as authorized under Rule 4.02, subd. 5(3), the defendant shall be arraigned in open court under Rule 5.04 or may be given time to plead. This is in accord with Minn. Stat. § 630.13 (1971). The defendant has an absolute right to appear by counsel to enter a plea of not guilty and set a trial date.

To the extent Minn. Stat. § 630.01 (1971) might require the permission of the court to make such an appearance by counsel, it is superseded. See also Rule 14.02, subd. 2 (plea of guilty by counsel); Rule 15.03, subd. 2 (petition to plead guilty); Rule 26.03, subd. 1(3) (defendant's presence at trial and sentencing); and Rule 27.03, subd. 2 (defendant's presence at sentencing). The requirement that the arraignment be conducted in open court is taken from F.R.Crim.P. 10 and follows Minn. Stat. § 630.01 (1971). The appearance of a corporation by counsel or an officer continues present Minnesota practice under Minn. Stat. § 630.16 (1971).

If the defendant pleads guilty in a misdemeanor case the procedure prescribed by Rule 15 shall be followed and thereafter the pre-sentencing and sentencing procedures provided by these rules shall be followed.

Following a plea of guilty a defendant or defense counsel under Rule 5.04, subd. 2 may request permission for the defendant to enter a plea of guilty to any other misdemeanor committed within the state which is under the jurisdiction of another court. The procedure for entering such pleas is set forth in Rule 15.10. Also see the comments on that rule. If the defendant has permission to enter the plea from the prosecuting attorney of the governmental unit authorized to prosecute the offense, then the court may accept the plea provided it is otherwise proper. Before accepting the plea, the defendant must be charged with the offense, but that could be done simply by a tab charge pursuant to Rule 4.02, subd. 5(3). By entering a plea under Rule 5.04, subd. 2 the defendant waives any right to object to the venue of the court which is accepting the plea. Following acceptance of the plea, the court has the power to sentence the defendant just as if it originally had jurisdiction over the offense. This rule was originally taken from ABA Standards, Pleas of Guilty, 1.2 (Approved Draft, 1968) and permits a defendant to dispose of a number of charges pending against the defendant throughout the state without the necessity and expense of being taken to each court personally while in custody. If any fines are collected upon entry of a guilty plea to an offense arising in another jurisdiction, the money is to be forwarded to the clerk of the court which originally had jurisdiction over the offense. Disbursement of such fines by the clerk of the court of original jurisdiction shall be as if the plea had actually been entered and the fine collected in the court of original jurisdiction. As to disbursement of such fines see Minn. Stat. §§ 487.31 and 487.33, subds. 1 and 5 (County Courts); 488A.03, subd. 6(a) and (d) and 488A.03, subd. 11(d) (Hennepin County Municipal Court); and 488A.20, subd. 4 (Ramsey County Municipal Court).

A defendant pleading not guilty who is entitled to a jury trial shall be asked under Rule 5.04, subd. 3 to exercise or waive that right. The defendant with the approval of the court has an absolute right to waive a jury trial under Rules 5.04, subd. 3 and 26.01, subd. 1(2)(a) in a misdemeanor case. A prosecutor who objects to the judge selected to try the case may file a notice to remove the judge. Rule 26.03, subd. 13; State v. Kraska, 294 Minn. 540, 201 N.W.2d 742 (1972). See also Rule 26.01, subd. 1(2)(b) as to waiver of jury trial when there is prejudicial publicity and Rule 26.01, subd. 1(3) as to withdrawal of the waiver. Rule 5.04, subd. 3 permits a defendant to waive a jury trial either in writing or orally in open court on the record. This is contrary to Minn. Stat.§ 631.01 which permitted only a written waiver. See Rule 26.01(1) as to a misdemeanor defendant's right to a jury trial and Rule 6.06 as to the time within which a trial must be held on a misdemeanor charge.

Under Rule 5.04, subd. 4 if the defendant pleads not guilty in a misdemeanor case and the prosecution has given the notice of evidence and identification prescribed by Rule 7.01, then both the defendant and the prosecution shall either waive or demand a Rasmussen (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965)) hearing. The waiver or demand is necessary only in cases where a jury trial is to be held since the notice is not required under Rule 7.01 if no jury trial is to be held in a misdemeanor case. Under Rule 7.01 the notice must be given at least 7 days before trial or by the conclusion of the pretrial conference if held. The waiver or demand shall be made at the first court appearance after notice is given and if given during a court appearance the waiver or demand should be made at that appearance. If no court appearance intervenes between the giving of notice and the trial, then waiver or demand shall be made immediately before trial. The waiver or demand of a hearing may be made either in writing or orally on the record. See Rule 12.04, subd. 3 as to the time of any evidentiary hearing demanded.

Rule 5.04, subd. 5 abolishes special appearances in misdemeanor cases. The purpose of such an appearance in the past has been to avoid waiver of a challenge to the personal jurisdiction of the court. Rules 10.02 and 17.06, subd. 4(1), however, reverse prior case law and provide a procedure for challenging the personal jurisdiction of the court after a complaint has been issued and a not guilty plea entered. See the Comments to Rule 10.02 as to this procedure.

By Rule 5.05 the judge or judicial officer shall set the conditions for the defendant's release under Rule 6.02. Under Rule 5.06 minutes of the proceedings at an arraignment or first appearance in court must be kept unless the judge or judicial officer directs that a verbatim record shall be made. The method of taking the minutes is within the discretion of the court. Where a guilty plea is entered to a misdemeanor offense punishable by incarceration, however, Rules 13.05 and 15.03 require either that a verbatim record be made or a petition to plead guilty be filed. This requirement is prescribed in light of State v. Casarez, 295 Minn. 534, 203 N.W.2d 406 (1973) where the court applied the holding of Boykin v. Alabama, 395 U.S. 238 (1969) to misdemeanor cases saying, "A guilty plea must appear on the record to have been voluntarily and intelligently made. If not, the plea must be vacated."

From the time of the defendant's initial appearance in court under Rule 5 until the Omnibus Hearing (Rule 11), the following schedule of events shall take place in felony and gross misdemeanor cases in which the appearances under Rule 5 and Rule 8 have not been consolidated pursuant to Rule 5.03:

1. Defendant's Initial Appearance before the court under Rule 5.

2. Service of Rasmussen (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965)) notice (Rule 7.01) on the defendant on or before the date of the appearance in the district court under Rule 8.

3. Appearance in the district court under Rule 8 (within 14 days after the initial appearance under Rule 5 unless the appearances under Rules 5 and 8 are consolidated pursuant to Rule 5.03).

4. Service of Spreigl (State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965)), State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967) notice on the defendant (Rule 7.02) on or before the date of the Omnibus Hearing (Rule 11).

5. Completion of discovery required of prosecution and defendant without order of court (Rules 9.01, subd. 1; 9.02, subd. 1) before the Omnibus Hearing (Rule 7.03).

6. Service of pretrial motions (Rules 10, 9.01, subd. 2; 9.02, subd. 2; 9.03, subd. 3; 18.02, subd. 2; 17.03, subd. 3 and subd. 4; 17.06; 20.01, subd. 2; 20.03, subd. 1) to be heard at the Omnibus Hearing (3 days before the Omnibus Hearing (Rule 10.04, subd. 1).)

7. Omnibus Hearing under Rule 11 within 28 days after defendant's appearance in the district court under Rule 8 and within 42 days after defendant's initial appearance under Rule 5 when the Rule 5 and Rule 8 appearances are not consolidated.

From the time of the defendant's initial appearance in court until the trial, the following schedule of events shall take place in misdemeanor cases:

1. Defendant's initial appearance (Rule 5).

2. Arraignment (Rule 5).

3. Notice of challenge to jurisdiction of the court following issuance of complaint

and entry of not guilty plea. Notice must be given within 7 days after entry of not guilty plea (Rule 10.02).

4. Service of Rasmussen notice (Rule 7.01) on or before the pretrial conference if held under Rule 12.01, or seven days before trial if no such conference is held.

5. Waiver or demand of Rasmussen hearing by prosecution and defendant at first court appearance following service of the Rasmussen notice (Rule 5.04, subd. 6).

6. Service of Spreigl (State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965), State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967)) notice on the defendant (Rule 7.02) on or before the date of the pretrial conference (Rule 5.04, subd. 6) if held or at least seven days before trial if no such conference is held.

7. Service of pretrial motions (Rules 10; 17.03, subds. 3 and 4; 17.06; 17.06, subd. 3 and motions to suspend criminal proceedings for mental incompetency and motions to disclose medical reports under Rule 20.04) at least three days before the pretrial conference or three days before trial if no pretrial conference is held, but no more than 30 days after the arraignment unless the court extends the time for good cause (Rule 10.04).

8. Pretrial conference may be held at such time as the court may order (Rule 12.01).

9. Pretrial motions heard at pretrial conference or just before trial if no such conference is held (Rule 10.04, subd. 2).

10. Discovery may be conducted at any time before trial as permitted by Rule 7.03.

11. Rasmussen hearing held immediately prior to jury trial unless otherwise ordered by the court for good cause and upon a trial to the court the hearing may be held as part of the trial (Rule 12.04, subd. 3).

12. Trial to be held within 60 days from the date of demand or within 10 days of demand if the defendant is in custody.

Rule 6. Pretrial Release

Rule 6.01 Release on Citation by Law Enforcement Officer Acting Without Warrant

Subd. 1. Mandatory Issuance of Citation.

(1) For Misdemeanors.

(a) By Arresting Officers. Law enforcement officers acting without a warrant, who have decided to proceed with prosecution, shall issue citations to persons subject to lawful arrest for misdemeanors, unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation. The citation may be issued in lieu of an arrest, or if an arrest has been made, in lieu of continued detention. If the defendant is detained, the officer shall report to the court the reasons for the detention. Ordinarily, for misdemeanors not punishable by incarceration, a citation shall be issued.

(b) At Place of Detention. When a person arrested without a warrant for a misdemeanor or misdemeanors, is brought to a police station or county jail, the officer in charge of the police station or the county sheriff in charge of the jail or an officer designated by the sheriff shall issue a citation in lieu of continued detention unless it reasonably appears to the officer that detention is necessary to prevent bodily harm to the accused or another or further criminal conduct or that there is a substantial likelihood that the accused will fail to respond to a citation. If the defendant is detained, the officer in

charge shall report to the court the reasons for the detention. Provided, however, that for misdemeanors not punishable by incarceration, a citation shall be issued.

(2) For Misdemeanors, Gross Misdemeanors and Felonies When Ordered by Prosecuting Attorney or Judge. An arresting officer acting without a warrant or the officer in charge of a police station or other authorized place of detention to which a person arrested without a warrant has been brought shall issue a citation in lieu of continued detention if so ordered by the prosecuting attorney or by the judge of a district court or by any person designated by the court to perform that function.

Subd. 2. Permissive Authority to Issue Citations for Gross Misdemeanors and Felonies. When a law enforcement officer acting without a warrant is entitled to make an arrest for a felony or gross misdemeanor or a person arrested without a warrant for a felony or gross misdemeanor is brought to a police station or county jail, the officer in charge of the police station or the county sheriff in charge of the jail or an officer designated by the sheriff may issue a citation in lieu of arrest or in lieu of continued detention if an arrest has been made, unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or further criminal conduct or that the accused may fail to appear in response to the citation.

Subd. 3. Form of Citation. A citation shall direct the accused to appear before a designated court or violations bureau at a specified time and place or to contact the court or violations bureau to schedule an appearance. The citation shall state that if the defendant fails to appear at or contact the court or violations bureau as directed in response to the citation, a warrant of arrest may issue. A summons or warrant issued because of a defendant's failure to respond to a citation may be based upon sworn facts establishing probable cause as set forth in or with the citation and attached to the complaint.

Subd. 4. Lawful Searches. The issuance of a citation does not affect a law enforcement officer's authority to conduct an otherwise lawful search.

Subd. 5. Persons in Need of Care. Notwithstanding the issuance of a citation, a law enforcement officer may take the cited person to an appropriate medical facility if that person appears mentally or physically incapable of self care.

Comment—Rule 6

See comment following Rule 6.06.

Rule 6.02 Release by Judge, Judicial Officer or Court

Subd. 1. Conditions of Release. Any person charged with an offense shall be released without bail pending the first court appearance when ordered by the prosecuting attorney, the judge of a district court, or by any person designated by the court to perform that function. Upon appearance before a judge, judicial officer, or court, a person so charged shall be ordered released pending trial or hearing on personal recognizance or on order to appear or upon the execution of an unsecured appearance bond in a specified amount, unless the court, judge or judicial officer determines, in the exercise of discretion, that such a release will be inimical of public safety or will not reasonably assure the appearance of the person as required. When such a determination is made, the court, judge or judicial officer shall, either in lieu of or in addition to the above methods

of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or hearing, or when otherwise required, or, if no single condition gives that assurance, any combination of the following conditions:

(a) Place the person in the care and supervision of a designated person or organization agreeing to supervise the person;

(b) Place restrictions on the travel, association or place of abode during the period of release;

(c) Require the execution of an appearance bond in an amount set by the court with sufficient solvent sureties, or the deposit of cash or other sufficient security in lieu thereof; or

(d) Impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

If such conditions of release, aside from an appearance bond, are imposed by the court, the court shall issue a written order containing those conditions of release. A copy of any such order shall be provided to the defendant and immediately to the law enforcement agency that has or had custody of the defendant. Such law enforcement agency shall also be provided by the court with any available information on the location of the named victim.

In any event, the court shall also fix the amount of money bail without other conditions upon which the defendant may obtain release either by posting cash or by sufficient sureties.

The defendant's release shall be conditioned on appearance at trial or hearing, including the Omnibus Hearing, evidentiary hearing and the pretrial conference prescribed by these rules, or at the taking of any deposition that may be ordered by the court.

Subd. 2. Determining Factors. In determining which conditions of release will reasonably assure such appearance, the judge, judicial officer or court shall on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, length of residence in the community, record of convictions, record of appearance at court proceedings or flight to avoid prosecution, and the safety of any other person or of the community.

Subd. 3. Pre-Release Investigation. In order to acquire the information required for determining the conditions of release, an investigation into the accused's background may be made prior to or contemporaneously with the defendant's appearance before the court, judge or judicial officer. The court's probation service or other qualified facility available to the court may be directed to conduct the investigation. Any information obtained from the defendant in response to an inquiry during the course of the investigation and any evidence derived from such information, shall not be used against the defendant at trial. This shall not preclude the use of evidence obtained by other independent investigation.

Subd. 4. Review of Conditions of Release. Upon motion, the court before which the case is pending shall review the conditions of release.

Comment—Rule 6

See comment following Rule 6.06.

Rule 6.03. Violation of Conditions of Release

Subd. 1a. Summons. Upon an application of the prosecuting attorney, court services or probation officer alleging probable cause that a defendant has violated the conditions of release, the judge, judicial officer or court that released the defendant may issue a summons directing the defendant to appear before such judge, judicial officer or court at a specified time. A summons shall be issued instead of a warrant unless a warrant is authorized under subdivision 1b of this rule.

Subd. 1b. Warrant. Upon application of the prosecuting attorney, court services or probation officer alleging probable cause that a defendant has violated the conditions of release, the judge, judicial officer or court that released the defendant may issue a warrant instead of a summons if it reasonably appears that there is a substantial likelihood that the defendant will fail to respond to a summons, or that the continued release of the defendant will endanger the safety of any person or the community, or that the location of the defendant is unknown. The warrant shall direct that the defendant be arrested and taken forthwith before such judge, judicial officer or court.

Subd. 2. Arrest Without Warrant. When a law enforcement officer has probable cause to believe that a released defendant has violated the conditions of release and it reasonably appears that the defendant's continued release will endanger the safety of any person or the community, the officer may arrest the defendant and take the defendant forthwith before a judge, judicial officer or court if it is impracticable to secure a warrant or summons as provided in this rule.

Subd. 3. Hearing. After hearing and upon finding that the defendant has violated conditions imposed on release, the judge, judicial officer or court shall continue the release upon the same conditions or impose different or additional conditions for the defendant's possible release as provided for in Rule 6.02, subd. 1.

Subd. 4. Commission of Crime. When it is shown that a complaint has been filed or indictment returned charging a defendant with the commission of a crime while released pending adjudication of a prior charge, the court with jurisdiction over the prior charge may, after notice and hearing, review and revise the conditions of possible release as provided for in Rule 6.02, subd. 1.

Comment—Rule 6

See comment following Rule 6.06.

Rule 6.04 Forfeiture

The procedure for forfeiture of an appearance bond shall be as provided by the law.

Comment—Rule 6

See comment following Rule 6.06.

Rule 6.05 Supervision of Detention

The trial court shall exercise supervision over the detention of defendants within the court's jurisdiction for the purpose of eliminating all unnecessary detention. The officer in charge of a detention facility shall make at least bi-weekly reports to the prosecuting attorney and to the court having jurisdiction over the prisoners listing each defendant who has been held in custody pending criminal charges, arraignment, trial, sentence or revocation of probation or parole for a period in excess of ten (10) days in felony and gross misdemeanor cases, and in excess of two (2) days in misdemeanor cases.

Comment—Rule 6

See comment following Rule 6.06.

Rule 6.06 Trial Date in Misdemeanor Cases

A defendant shall be tried as soon as possible after entry of a not guilty plea. On demand made in writing or orally on the record by the prosecuting attorney or the defendant, the trial shall be commenced within sixty (60) days from the date of the demand unless good cause is shown upon the prosecuting attorney's or the defendant's motion or upon the court's initiative why the defendant should not be brought to trial within that period. The time period shall not begin to run earlier than the date of the not guilty plea. Where the defendant is in custody, trial shall be commenced within ten (10) days of demand and if not so commenced, the defendant shall be released subject to such nonmonetary release conditions as may be required by the court under Rule 6.02, subd. 1.

Comment—Rule 6

In misdemeanor cases a citation ordinarily must be issued if the misdemeanor charged is not punishable by incarceration. It is the opinion of the Advisory Committee that where possible, a person should not be taken into custody for an offense for which the person could not be incarcerated even if found guilty.

Rule 6.01 adopts the policy expressed in ABA Standards, Pre-Trial Release, 2.1 (Approved Draft, 1968) favoring the issuance of citations in lieu of arrest or of continued custody after an arrest by an officer acting without a warrant.

Rule 6.01, subd. 1(1)(a) and (b) make it mandatory upon the arresting or detaining officer and officer-in-charge of the stationhouse to issue a citation to any person who is subject to lawful arrest without a warrant for misdemeanors, including ordinance violations, or who has been arrested without a warrant for those offenses, unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or to prevent further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation. The uniform traffic ticket may be used for this purpose. Minn. Stat. § 169.99 (1971).

The initial determination of whether to issue a citation is to be made by the arresting or detaining officer in the field from the information available on the spot. If that officer decides not to issue a citation, the officer-in-charge of the stationhouse will then make a determination from all the information that may then be available, including any additional information disclosed by further interrogation and investigation.

In making their determination of whether to issue a citation, the officers may take into account the defendant's place and length of residence, family relationships, references, present and past employment, criminal record, past history of response to criminal process, and such facts as have a bearing on the likelihood of harmful or criminal conduct. (See ABA Standards, Pre-Trial Release 2.2, 2.3 (Approved Draft, 1968).)

By Rule 6.01, subd. 1(1), if a citation is not issued and an arrest is made, the officer shall report to the court the reasons for not issuing it, but the failure to issue a citation is not jurisdictional. The reasons for failing to issue a citation should be specified particularly for the defendant involved. It is not sufficient to simply use a checklist or only the words of the rule to justify the failure to issue a citation. Under these rules an arrest for a misdemeanor should be considered the exception rather than the normal practice.

Under present Minnesota statutory law (Minn. Stat. §§ 492.01 to 492.06, 487.28 (1971)), citations may be issued for traffic and specified ordinance violations for which a traffic and ordinance violations bureau has been established. Traffic tickets for traffic violations may be issued under Minn. Stat. § 169.91 (1971). Rule 6.01, subd. 1 extends the authority to issue citations for all misdemeanors and ordinance violations and makes it mandatory unless it reasonably appears to the arresting or detaining officer or officer-in-charge of the stationhouse that detention is necessary to prevent harmful or criminal conduct or that there is substantial likelihood that the defendant will not appear in response to a citation.

Rule 6.01, subd. 1(2) requires that a citation be issued for any offense whenever ordered by the prosecuting attorney or by a district court judge.

Rule 6.01, subd. 2 gives the officer-in-charge of the stationhouse permissive authority to issue citations for gross misdemeanors and felonies unless it reasonably appears that detention is necessary to prevent harmful or criminal conduct or that the defendant may not appear in response to a citation. (This follows in substance the recommendation of ABA Standards, Pre-Trial Release 2.3(a) (Approved Draft, 1968).)

The form of citation prescribed by Rule 6.01, subd. 3 follows ABA Standards, Pre-Trial Release, 1.4(a) (Approved Draft, 1968), except that the provision for a written promise to appear has been eliminated. It is the belief of the Advisory Committee that requiring a written promise to appear will add very little additional assurance that the defendant will appear and may cause an unnecessary confrontation between the defendant and the law enforcement officer. If it reasonably appears to the law enforcement officer that there is a substantial likelihood that the accused will fail to respond to the citation, an arrest may be made. If the defendant does not respond to the citation as directed and a summons or warrant is necessary, the facts establishing probable cause need not be set forth separately in the complaint as is otherwise required by Rule 2.01. Rather, the citation may be attached to the complaint which is then sworn to by the complainant. This is in accord with the current practice in many courts. If such a complaint is issued the defendant still retains the right under Rule 4.02, subd. 5(3) to demand a complaint that complies with the requirements of Rule 2.01.

Rule 6.01, subd. 4 that the issuance of a citation does not prevent or affect an

otherwise lawful search adopts ABA Standards, Pre-Trial Release 2.4 (Approved Draft, 1968).

Rule 6.01, subd. 5 authorizing an officer who issues a citation to take the accused to a medical facility adopts ABA Standards, Pre-Trial Release 2.5 (Approved Draft, 1968). Rule 6.01, subd. 5 is intended merely to stress that the issuance of a citation in lieu of a custodial arrest or continued detention does not affect the statutory rights of a law enforcement officer to transport a person in need of care to an appropriate medical facility. The extent of a law enforcement officer's powers to transport a person for such purposes will still be governed by statute and is neither expanded nor contracted by Rule 6.01, subd. 5. See, e.g., Minn. Stat. § 609.06(8) regarding the right to use reasonable force, in certain situations, toward mentally ill or mentally defective persons and Minn. Stat. § 253A.04, subd. 2 governing the right of a health or peace officer to transport mentally ill or intoxicated persons to various places for care.

These rules do not prescribe the consequences of a failure to obey a citation. The remedy available is the issuance of a warrant or summons upon a complaint.

These rules do not require the adoption of a bail schedule. The purpose of these rules is to assure that whenever reasonably possible defendant will be released without bail. Any bail schedule adopted pursuant to Minn. Stat. § 629.71 (1971) should be applied only in those cases where the defendant would not otherwise be released without bail or upon issuance of a citation under these rules. The maximum cash bail which can be required for misdemeanors will continue to be twice the highest possible cash fine upon conviction as prescribed by Minn. Stat. § 629.47 (1971).

Rule 6.02, subd. 1 specifying the conditions of release that may be imposed upon a defendant at the first appearance before a judge, judicial officer, or court (Rule 5.05, See also Rules 6.02, subd. 4, 19.05) is taken from the Bail Reform Act of 1966, 18 U.S.C. §§ 3141-3152, and in general follows ABA Standards, Pre-Trial Release 5.1, 5.3 (Approved Draft, 1968). If conditions of release are endorsed on the warrant (Rule 3.02, subd. 1), the defendant should be released on meeting those conditions.

Rule 6.02, subd. 1 substantially follows the language of § 3146(a). The rule directs that the defendant shall be released on personal recognizance, or on order to appear, or on the execution of an unsecured appearance bond unless the judge or judicial officer determines, in the exercise of discretion, that release by one of those methods will not reasonably assure the defendant's appearance.

Release on "personal recognizance" is a release without bail upon defendant's written promise to appear at appropriate times. (See ABA Standards, Pre-Trial Release 1.4(d) (Approved Draft, 1968).) An "Order to Appear" is an order issued by the court releasing the defendant from custody or continuing the defendant at large pending disposition of the case, but requiring the defendant to appear in court or in some other place at all appropriate times. (See ABA Standards, Pre-Trial Release, 1.4(c) (Approved Draft, 1968).)

If the court determines that release on personal recognizance, order to appear, or on an unsecured appearance bond will be inimical of public safety or will not reasonably secure the defendant's appearance, the court shall in lieu of or in addition to those methods of release impose the first or any combination of the four conditions

specified in Rule 6.02, subd. 1 that will assure appearance.

Basically these conditions are taken from 18 U.S.C. § 3146 and ABA Standards, Pre-Trial Release, 5.2, 5.3 (Approved Draft, 1968). They emphasize that the conditions of release should proceed from the least restrictive to the ultimate imposition of cash bail depending on the circumstances in each case. Release on monetary conditions should be reduced to minimal proportions. It should be required only in cases in which no other conditions will reasonably insure the defendant's appearance. When monetary conditions are imposed, bail should be set at the lowest level necessary to ensure the defendant's reappearance.

Rule 341(g)(2) of the Uniform Rules of Criminal Procedure (1987) and Standard 10-5.3(d) of the American Bar Association Standards for Criminal Justice (1985) provide for release upon posting of ten percent of the face value of an unsecured bond and upon posting of a secured bond by an uncompensated surety. Although Rule 6.02 does not expressly authorize these options, the rule is broad enough to permit the court to set such conditions of release in an unusual case. If the ten percent cash option is authorized by the trial court, it should be in lieu of, not in addition to, an unsecured bond, because there is generally no reasonable expectation of collecting on the unsecured bond and the public should not be deluded into thinking it will be collected. The judge should consider the availability of a reliable person, to help assure the appearance of the defendant. If cash bail is deposited with the court it is deemed to be the property of the defendant pursuant to Minn. Stat. § 629.53 (1993) and according to that statute the court may apply the deposit to any fine or restitution imposed.

For certain driving while intoxicated prosecutions under Minn. Stat. § 169.121 where the defendant has prior convictions under that or related statutes, the court may impose the conditions of release set forth in Minn. Stat. § 169.121, subd. 1c (1997). Those conditions could include alcohol testing and impoundment of license plates. However, Rule 6.02 subd. 1 requires that even though the court sets conditions other than money bail upon which the defendant may be released, or even though the court prescribes other conditions in addition to money bail, the court shall also fix the amount of money bail (secured by cash, property, or qualified sureties) without any other conditions upon which the defendant may obtain release. The Advisory Committee was of the opinion that this is required by the defendant's constitutional right to bail. Minn. Const. Art. 1, § 7 makes all persons bailable by sufficient sureties for all offenses. It would violate this constitutional provision for the court to require that the monetary bail could be satisfied only by a cash deposit. The defendant must also be given the option of satisfying the monetary bail by sufficient sureties. State v. Brooks, 604 N.W.2d 345 (Minn. 2000).

If the court sets conditions of release, aside from an appearance bond, then the court must issue a written order stating those conditions. Any such written order should be issued promptly and the defendant's release should not be unnecessarily delayed. In addition to providing a copy of any such order to the defendant, the court must immediately provide it to the law enforcement agency that has or had custody of the defendant along with information about the named victim's whereabouts. This provision for a written order is in accord with Minn. Stat. § 629.715 (1997) which concerns conditions of release for defendants charged with crimes against persons. Such written orders are required because it is important that the defendant, as well as other concerned persons and law enforcement officers, know precisely what conditions govern the

defendant's release.

In connection with the setting of bail or other conditions of release, see Minn. Stat. § 629.72, subd. 7 and Minn. Stat. § 629.725 as to the duty of the court to provide notice of a hearing on the release of the defendant from pretrial detention in domestic abuse, harassment or crimes of violence cases. Also see Minn. Stat. § 629.72, subd. 6 and Minn. Stat. § 629.73 as to the duty of the law enforcement agency having custody of the defendant in such cases to provide notice of the defendant's impending release.

Under Rule 6.02, subd. 1, defendant's release, in whatever form, shall be conditioned on appearance at trial or hearing, including the Omnibus Hearing under Rule 11, and at the taking of depositions under Rule 21.01.

Rule 6.02, subd. 2 enumerates the factors that a court shall take into account in determining the conditions of release (including personal recognizance, order to appear, or unsecured bond) that will reasonably assure the defendant's appearance. This rule follows the language of 18 U.S.C. § 3146(b) and ABA Standards, Pre-Trial Release, 5.1 (Approved Draft, 1968). It also permits the court to consider the safety of any other person or the community in determining the conditions of release to be imposed.

Recommendation 5, concerning sexual assault, in the Final Report of the Minnesota Supreme Court Task Force on Gender Fairness in the Courts, 15 Wm.Mitchell L.Rev. 827 (1989), states that "Minnesota judges should not distinguish in setting bail, conditions of release, or sentencing in non-familial criminal sexual conduct cases on the basis of whether the victim and defendant were acquainted." This prohibition should be applied in setting bail in other cases as well.

Rule 6.02, subd. 3 authorizing a pre-release investigation to obtain the necessary information for making the release decision is in accord with ABA Standards, Pre-Trial Release, 4.5 (Approved Draft, 1968).

Under Rule 6.02, subd. 4 the court which initially set conditions of release may on motion re-examine them if the case is still pending before that court, and may continue or revise the conditions in accordance with Rule 6.02, subds. 1 and 2. If the case is not pending before that court, the conditions of release may on motion be reviewed and continued or revised under the provisions of Rule 6.02, subds. 1 and 2 by the court before which the case is then pending. This is generally in accord with 18 U.S.C. § 3147(a) and ABA Standards, Pre-Trial Release, 5.9(b) (Approved Draft, 1968).

NOTE: The rule does not cover appeal of the release decision nor does it include release following a conviction. Appeal of the release decision is permitted under Rules 28 and 29. These rules also set standards and procedures for the release of a defendant following conviction.

Rule 6.03 prescribes the procedures to be followed upon violation of conditions of release. The rule is substantially in accord with the ABA Standards, Pre-Trial Release, 10-5.6 (Approved Draft, 2002), except that by Rule 6.03, subd. 3, the court is not authorized to revoke the defendant's release without setting bail because such action is not permitted under Minn. Const. Art. 1, § 5. The court must continue or revise the release conditions, governed by the considerations set forth in Rule 6.02, subds. 1 and 2. Under those rules, the court may increase the defendant's bail. If the defendant is unable

to post the increased bail or to meet alternative conditions of release, the defendant may be kept in custody. Also, Rule 6.03 requires the issuance of a summons rather than a warrant under circumstances similar to those required under Rule 3.01. Rule 6.03, subd. 2, permits a warrantless arrest for violating conditions of release if it reasonably appears that the defendant's continued release will endanger the safety of any person or the community, but only if it is impracticable to secure a warrant or summons as provided by the rule. Rule 6.03, subd. 3, requires only an informal hearing and does not require a showing of willful default, but leaves it to the discretion of the court to determine under all of the circumstances whether to continue or revise the conditions of possible release.

There are no provisions similar to Rule 6.03 in existing Minnesota statutory law except Minn. Stat. § 629.58 (1971) which provides that if a defendant fails to perform the conditions of a recognizance, process shall be issued against the persons bound thereby. Rule 6.03, subds. 1 and 2 take the place of that statute.

Minn. Stat. § 629.63 (1971) providing for surrender of the defendant by the surety on the defendant's bond is not affected by Rule 6.03. To the extent that it is inconsistent with Rule 6.03 and Rule 6.02, subds. 1 and 2, however, Minn. Stat. § 629.64, requiring that in the event a defendant is surrendered by such surety money bail shall be set, is superseded.

Rule 6.03, subd. 4 follows in substance ABA Standards, Pre-Trial Release, 5.8 (Approved Draft, 1968). The rule provides for a review of release conditions when the defendant has been subsequently charged by complaint or indictment with a crime (other than that upon which initially released). The rule provides that the court with jurisdiction over the prior charge shall review the release conditions upon that charge and may continue or revise them (governed by the considerations set forth in Rule 6.02, subds. 1 and 2).

Rule 6.04 continues the existing procedures for forfeiture of an appearance bond (Minn. Stat. §§ 629.48, 629.58-60 (1971)).

Rule 6.05 providing for the trial court's supervision and review--on the court's own motion--of the detention of defendants under the court's jurisdiction, is in accord with ABA Standards, Pre-Trial Release, 5.9(c) (Approved Draft, 1968).

Rule 6.06 provides that in misdemeanor cases a defendant shall be brought to trial within 60 days after demand therefor is made by the prosecuting attorney or defendant, unless good cause is shown for a delay, but regardless of a demand the defendant shall be tried as soon as possible. The trial may be postponed upon request of the prosecuting attorney or the defendant, or upon the court's initiative. Good cause for the delay does not include court calendar congestion unless exceptional circumstances exist. As to sanctions for violation of these speedy trial provisions see State v. Kasper, 411 N.W.2d 182 (Minn.1987) and State v. Friberg, 435 N.W.2d 509 (Minn.1989). In misdemeanor cases Rule 6.06 supersedes Minn. Stat. § 611.04 (1971) which required the defendant to be brought to trial at the next term of court. As to the right to a speedy trial generally, see the comments to Rule 11.10.

Rule 7 Notice by Prosecuting Attorney of Evidence and Identification Procedures; Completion of Discovery

Rule 7.01 Notice of Evidence and Identification Procedures

In any case where a jury trial is to be held, when the prosecution has (1) any evidence against the defendant obtained as a result of a search, search and seizure, wiretapping, or any form of electronic or mechanical eavesdropping; (2) any confessions, admissions or statements in the nature of confessions made by the defendant; (3) any evidence against the defendant discovered as a result of confessions, admissions or statements in the nature of confessions made by the defendant; or (4) when in the investigation of the case against the defendant, any identification procedures were followed, including but not limited to lineups or other observations of the defendant and the exhibition of photographs of the defendant or of any other persons, the prosecuting attorney shall notify the defendant or defense counsel of such evidence and identification procedures. In felony and gross misdemeanor cases notice shall be given in writing on or before the date set for the defendant's initial appearance in the district court as provided by Rule 5.03. In misdemeanor cases, notice shall be given either in writing or orally on the record in court on or before the date set for the defendant's pretrial conference if one is scheduled or seven (7) days before trial if no pretrial conference is to be held.

Such written notice may be given either personally or by ordinary mail to the defendant's or defense counsel's last known residential or business address or by leaving it at such address with a person of suitable age and discretion then residing or working there.

Comment—Rule 7

See comment following Rule 7.04.

Rule 7.02 Notice of Additional Offenses

The prosecuting attorney shall notify the defendant or defense counsel in writing of any additional offenses, the evidence of which may be offered at the trial under any exceptions to the general exclusionary rule. In cases of felonies and gross misdemeanors, the notice shall be given at or before the Omnibus Hearing under Rule 11 or as soon after the Omnibus Hearing as the offenses become known to the prosecuting attorney. In misdemeanor cases, the notice shall be given at or before the pretrial conference under Rule 12 if held or as soon thereafter as the offense becomes known to the prosecuting attorney. If no pretrial conference is held, then the notice shall be given at least seven (7) days before trial or as soon thereafter as known to the prosecuting attorney. Such additional offenses shall be described with sufficient particularity to enable the defendant to prepare for trial. The notice need not include offenses for which the defendant has been previously prosecuted or those that may be offered in rebuttal of the defendant's character witnesses or as a part of the occurrence or episode out of which the offense charged against defendant arose.

Comment—Rule 7

See comment following Rule 7.04.

Rule 7.03 Notice of Prosecutor's Intent to Seek an Aggravated Sentence

At least seven days prior to the Omnibus Hearing, or at such later time if permitted by the court upon good cause shown and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

Rule 7.04 Completion of Discovery

Before the date set for the Omnibus Hearing, in felonies and gross misdemeanor cases, the prosecution and defendant shall complete the discovery that is required by Rule 9.01 and Rule 9.02 to be made without the necessity of an order of court.

In misdemeanor cases, without order of the court the prosecuting attorney on request of the defendant or defense counsel shall, prior to arraignment or at any time before trial, permit the defendant or defense counsel to inspect the police investigatory reports. Upon request, the defendant or defense counsel also shall be entitled to receive a reproduction of the police investigatory reports after the arraignment. this obligation to provide a reproduction of the police investigatory reports may be satisfied by any method that provides to the defendant or defense counsel an exact reproduction of such reports, including E-mail, facsimile transmission, or similar method if that method is available to both parties. A reasonable charge may be made to cover the actual costs of reproduction unless the defendant is represented by the public defender or an attorney working for a public defense corporation under Minn. Stat. § 611.216 or is determined by the court to be financially unable to obtain counsel pursuant to Rule 5.02. Any other discovery shall be by consent of the parties or by motion to the court.

Comment—Rule 7

Under Rule 7.01 the Rasmussen notice (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965)) of evidence obtained from the defendant and of identification procedures shall be given on or before the defendant's appearance in the district court under Rule 8 (within 14 days after the first appearance in the court under Rule 5) in order that the defendant may determine at the time of the appearance in the district court under Rule 8 whether to waive or demand a Rasmussen hearing (Rule 8.03). If the defendant then demands a Rasmussen hearing, it will be included in the Omnibus Hearing (Rule 11) no more than 28 days later. It is permissible for the prosecuting attorney to attach to a complaint for service a notice under Rule 7.01 or a discovery request under Rule 9.02.

In misdemeanor cases under Rule 7.01, the Rasmussen notice of evidence obtained from the defendant and of identification procedures may be given at arraignment and in such a case the waiver or demand of a hearing takes place at that time (Rule 5.04, subd. 4). However, since misdemeanor arraignments are often within one day or even a few hours of an arrest, a prosecutor may not have sufficient knowledge of the case to issue a Rasmussen notice at that time. Rather than discourage such prompt arraignments, this rule provides that the Rasmussen notice may be served as late as the pre-trial conference, if held, or at least seven days before trial if no pre-trial conference is held. The Rasmussen notice procedure is required only where a jury trial is to be held. This continues present law under City of St. Paul v. Page, 285 Minn. 374, 173 N.W.2d 460 (1969). Even where no notice is required, however, it is anticipated that the

discovery permitted by Rule 7.03 will give the defendant and defense counsel notice of any evidentiary or identification issues that would have been the subject of a formal Rasmussen notice.

The notice required by Rule 7.01 must be in writing in felony and gross misdemeanor cases and may be either in writing or oral on the record in misdemeanor cases. Any written notice may be delivered either personally or by ordinary mail to the defendant's or defense counsel's last known residential or business address or by leaving it at such address with a person of suitable age and discretion then residing or working there. If the notice is not actually received, the court may grant a continuance to prevent any prejudice due to surprise.

Rule 7.02 requires that the Spreigl notice (State v. Spreigl, 272 Minn. 488, 139 N.W.2d 167 (1965), State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967)) of additional offenses be given on or before the date of the Omnibus Hearing (Rule 11) in order that any issues that may arise as to the admissibility of the evidence of these offenses at trial may be ascertained and determined at the Omnibus Hearing. (Rule 11.04.) If the prosecuting attorney learns of any such offenses after the Omnibus Hearing, the prosecuting attorney shall immediately give notice thereof to the defendant.

Rule 7.03 establishes the notice requirements for a prosecutor to initiate proceedings seeking an aggravated sentence in compliance with Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). See Rule 1.04(d) as to the definition of "aggravated sentence." Also, see the comments to that rule. The written notice required by Rule 7.03 must include not only the grounds or statute relied upon, but also a summary statement of the supporting factual basis. However, there is no requirement that the factual basis be given under oath. In developing this rule, the Advisory Committee was concerned that if prosecutors were required to provide notice too early in the proceedings, they may not yet have sufficient information to make that decision and therefore may be inclined to overcharge. On the other hand it is important that defendants and defense counsel have adequate advance notice of the aggravated sentence allegations so that they can defend against them. Further, the earlier that accurate, complete aggravated sentence notices are given, the more likely it is that cases can be settled, and at an earlier point in the proceedings. The requirement of the rule that notice be given at least seven days before the Omnibus Hearing balances these important, sometimes competing, policy considerations. However, the rule recognizes that it may not always be possible to give notice by that time and the court may permit a later notice for good cause shown so long as the later notice will not unfairly prejudice the defendant. In making that decision the court can consider whether a continuance of the proceedings or other conditions would cure any unfair prejudice to the defendant. Pretrial issues concerning a requested aggravated sentence will be considered and decided under the Omnibus Hearing provisions of Rule 11.04.

Rule 7.04 requires that the discovery provided by Rules 9.01, subd. 1; 9.02, subd. 1 to be made without order of court shall be completed by the prosecution and defense before the Omnibus Hearing (Rule 11). This will permit the court to resolve at the Omnibus Hearing any issues that may have arisen between the parties with respect to discovery (Rules 9.03, subd. 8; 11.04). It may also result in a plea of guilty at the Omnibus Hearing (Rule 11.07). All notices under Rule 7 shall also be filed with the court (Rule 33.04).

Rule 7.04, in misdemeanor cases, requires the prosecutor upon request of the defendant or defense counsel at any time before trial to permit inspection of the police investigatory reports in the case. Additionally, upon request of the defendant or defense counsel, the prosecutor is obligated to provide a reproduction of the police investigatory reports to defendants or defense counsel after the arraignment. This obligation of the prosecutor to provide a reproduction of such reports may be satisfied not just by photocopying, but by other existing or future methods that permit transmission of an exact reproduction to the defendant or defense counsel. This would include E-mail or facsimile transmission if the defendant or defense counsel has the equipment necessary to receive such transmissions. The provision of the rule permitting free copies to public defenders and attorneys working for public defense corporation under Minn. Stat. § 611.216 is in accord with Minn. Stat. § 611.271. Under this rule the prosecutor should reveal not only the reports physically in the prosecutor's possession, but also those concerning the case which are yet in the possession of the police. This disclosure of investigatory reports is already the practice of many prosecutors and in most misdemeanor cases should be sufficient discovery. This type of discovery is particularly important in misdemeanor cases where prosecution can be initiated upon a tab charge (Rule 4.02, subd. 5(3)) without a complaint or indictment. A defendant, of course, may request a complaint under Rule 4.02, subd. 5(3) to be better informed of the charges, but it is expected that complaints will seldom be requested when the investigatory reports are disclosed to the defendant.

In those rare cases where additional discovery is considered necessary by either party, it shall be by consent of the parties or by motion to the court. In such cases it is expected that the parties and the court will be guided by the extensive discovery provisions of these rules. Rule 9 provides guidelines for deciding any such motions, but they are not mandatory and the decision is within the discretion of the trial judge. State v. Davis, 592 N.W.2d 457 (Minn. 1999).

Rule 8. Defendant's Initial Appearance Before the District Court Following the Complaint or Tab Charge in Felony and Gross Misdemeanor Cases

Rule 8.01 Place of Appearance and Arraignment

The defendant's initial appearance following the complaint or, for a designated gross misdemeanor as defined by Rule 1.04(b), a tab charge under this rule shall be held in the district court of the judicial district where the alleged offense was committed.

Unless the offense charged in the complaint is a homicide and the prosecuting attorney notifies the court that the case will be presented to a grand jury, or the offense is punishable by life imprisonment, the defendant shall be arraigned upon the complaint or the complaint as it may be amended or, for designated gross misdemeanors, the tab charge, but may only enter a plea of guilty at that time. If the defendant does not wish to plead guilty, no other plea shall be called for and the arraignment shall be continued until the Omnibus Hearing when pursuant to Rule 11.10 the defendant shall plead to the complaint or the complaint as amended or be given additional time within which to plead. If the offense charged in the complaint is a homicide and the prosecuting attorney notifies the court that the case will be presented to the grand jury, or if the offense is punishable by life imprisonment, the presentation of the case to the grand jury shall commence within 14 days from the date of defendant's appearance in the court under this rule, and an indictment or report of no indictment shall be returned within a reasonable time. If an

indictment is returned, the Omnibus Hearing under Rule 11 shall be held as provided by Rule 19.04, subd. 5.

Comment—Rule 8

See comment following Rule 8.06.

Rule 8.02 Plea of Guilty

At an initial appearance under this rule, the defendant may enter a plea of guilty to a felony, a gross misdemeanor, or a misdemeanor as permitted under Rule 15. If the defendant enters a plea of guilty, the pre-sentencing and sentencing procedures provided by these rules shall be followed.

Comment—Rule 8

See comment following Rule 8.06.

Rule 8.03 Demand or Waiver of Hearing

If the defendant does not plead guilty, the defendant and the prosecution shall each either waive or demand a hearing as provided by Rule 11.02 on the admissibility at trial of any of the evidence specified in the notice given by the prosecuting attorney under Rule 7.01 or the admissibility of any evidence obtained as a result of such evidence.

Comment—Rule 8

See comment following Rule 8.06.

Rule 8.04 Plea and Time and Place of Omnibus Hearing

(a) If the defendant does not plead guilty, the Omnibus Hearing on the issues as provided for by Rules 11.03 and 11.04, shall be held within the time hereinafter specified.

(b) If hearing on either of the issues set forth in Rule 8.03 is demanded, the Omnibus Hearing shall also include the issues provided for by Rule 11.02.

(c) The Omnibus Hearing provided for by Rule 11 shall be scheduled for a date not later than twenty-eight (28) days after the defendant's appearance before the court under this rule. The court may extend such time for good cause related to the particular case upon motion of the prosecuting attorney or defendant or upon the court's initiative.

Comment—Rule 8

See comment following Rule 8.06.

Rule 8.05 Record

A verbatim record shall be made of the proceedings at the defendant's initial appearance before the court under this rule.

Comment—Rule 8

See comment following Rule 8.06.

Rule 8.06 Conditions of Release

In accordance with the rules governing bail or release, the court may continue or amend those conditions for defendant's release set by the court previously.

Comment—Rule 8

Unless the offense charged in the complaint is a homicide and the prosecuting attorney notifies the court that the case will be presented to a grand jury, or the offense is punishable by life imprisonment, upon the defendant's initial appearance before the court under this rule following a complaint charging a felony or gross misdemeanor or a tab charge charging a designated gross misdemeanor as defined by Rule 1.04(b) (within 14 days after the first appearance under Rule 5), the defendant shall, upon request, be permitted to plead guilty to the complaint, tab charge or amended complaint (See Rules 3.04, subd. 2; 17.05) as provided by Rule 15. At this stage of the proceeding, the tab charge or complaint which was filed in the court, or that complaint as it may be amended (Rule 17.05) or superseded (Rule 3.04, subd. 2), takes the place of the information under existing Minnesota law (Minn. Stat. §§ 628.29- 629.33 (1971)) and provides the basis for the court's jurisdiction over the prosecution and the offenses charged in the complaint or the tab charge. Under Rule 4.02, subd. 5(3) a prosecution for a designated gross misdemeanor may be commenced by tab charge, but a complaint must be served and filed within 48 hours of the defendant's appearance on the tab charge if the defendant is in custody or within 10 days of the defendant's appearance on the tab charge if the defendant is not in custody. Therefore, if the separate Rule 8 appearance occurs later than those time limits, as will usually be the case, a complaint must have been served and filed for such a gross misdemeanor or prosecution to continue. However, if the Rule 5 and Rule 8 appearances were consolidated under Rule 5.03, it would be possible for the tab charge to still be effective at the time of the Rule 8 appearance.

If the defendant pleads guilty the procedures provided by Rule 15 shall be followed.

The defendant is not required to enter a plea upon the appearance in court under Rule 8. The defendant may, however, plead guilty.

Under Rule 8.03, if the defendant does not plead guilty, and if the prosecution has given the notice prescribed by Rule 7.01 both the defendant and the prosecution shall be required to either waive or demand a Rasmussen (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965)) hearing. (Rule 8.03).

If the Rasmussen hearing is waived by both the prosecution and the defense, the Omnibus Hearing provided by Rule 11 shall be held without a Rasmussen hearing. (See the initial comments to Rule 11 describing the three parts of an Omnibus Hearing.)

If the Rasmussen hearing is demanded, the hearing shall be held as part of the Omnibus Hearing as provided by Rule 11.02.

The Omnibus Hearing shall be commenced not later than 28 days after the defendant's initial appearance in court under Rule 8 unless the time is extended for good cause related to the particular case. (Rule 8.04). If the time is extended, the Omnibus Hearing must still be completed and the issues decided within 30 days after the defendant's initial appearance before the court under Rule 8 unless extended by the Court for good cause related to the particular case. See Rules 11.04 and 11.07 and the comments to Rule 11. See Minn. Stat. § 611A.033 regarding the prosecutor's duties under the Victim's Rights Act to make reasonable efforts to provide advance notice of any change in the schedule of court proceedings. This would include the Omnibus Hearing as well as trial or any other hearing.

Under Rule 8.01, if the offense charged in the complaint is punishable by life imprisonment, or if it is a homicide and the prosecuting attorney notifies the court the case will be presented to the grand jury, the defendant shall not be arraigned upon the complaint, and the case shall be presented to the grand jury as provided by Rule 8.01. If an indictment is returned, the Omnibus Hearing shall be held as provided by Rule 19.04, subd. 5.

Rule 8.05 provides for a verbatim record of the proceedings under Rule 8.

Under Rule 8.06 the court may in accordance with the provisions of Rule 6.02 continue or amend the bail or conditions of release set by the court previously.

Rule 9. Discovery in Felony and Gross Misdemeanor Cases

Rule 9.01 Disclosure by Prosecution

Subd. 1. Disclosure by Prosecution Without Order of Court. Without order of court and except as provided in Rule 9.01, subd. 3, the prosecuting attorney on request of defense counsel shall, before the date set for Omnibus Hearing provided for by Rule 11, allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate to the case and make the following disclosures:

(1) Trial Witnesses; Grand Jury Witnesses; Other Persons.

(a) The prosecuting attorney shall disclose to defense counsel the names and addresses of the persons intended to be called as witnesses at the trial together with their prior record of convictions, if any, within the prosecuting attorney's actual knowledge. The prosecuting attorney shall permit defense counsel to inspect and reproduce such witnesses' relevant written or recorded statements and any written summaries within the prosecuting attorney's knowledge of the substance of relevant oral statements made by such witnesses to prosecution agents.

(b) The fact that the prosecution has supplied the name of a trial witness to defense counsel shall not be commented on in the presence of the jury.

(c) If the defendant is charged by indictment, the prosecuting attorney shall disclose to defense counsel the names and addresses of the witnesses who testified before the grand jury in the case against the defendant.

(d) The prosecuting attorney shall disclose to defense counsel the names and the addresses of persons having information relating to the case.

(2) Statements. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any relevant written or recorded statements which relate to the case within the possession or control of the prosecution, the existence of which is

known by the prosecuting attorney, and shall provide defense counsel with the substance of any oral statements which relate to the case.

(3) Documents and Tangible Objects. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce books, grand jury minutes or transcripts, law enforcement officer reports, reports on prospective jurors, papers, documents, photographs and tangible objects which relate to the case and the prosecuting attorney shall also permit defense counsel to inspect and photograph buildings or places which relate to the case.

(4) Reports of Examinations and Tests. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments or comparisons made in connection with the particular case. The prosecuting attorney shall allow the defendant to have reasonable tests made. If a scientific test or experiment of any matter, except those conducted under Minn. Stat. Ch. 169, may preclude any further tests or experiments, the prosecuting attorney shall give the defendant reasonable notice and an opportunity to have a qualified expert observe the test or experiment.

(5) Criminal Record of Defendant and Defense Witnesses. The prosecuting attorney shall inform defense counsel of the records of prior convictions of the defendant and of any defense witnesses disclosed under Rule 9.02, subd. 1(3)(a) that are known to the prosecuting attorney provided the defense counsel informs the prosecuting attorney of any such records known to the defendant.

(6) Exculpatory Information. The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.

(7) Evidence Relating to Aggravated Sentence. The prosecuting attorney shall disclose to the defendant or defense counsel all evidence not otherwise disclosed upon which the prosecutor intends to rely in seeking an aggravated sentence.

(8) Scope of Prosecutor's Obligations. The prosecuting attorney's obligations under this rule extend to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office.

Subd. 2. Discretionary Disclosure Upon Order of Court.

(1) Matters Possessed by Other Governmental Agencies. Upon motion of the defendant, the court for good cause shown shall require the prosecuting attorney, except as provided by Rule 9.01, subd. 3, to assist the defendant in seeking access to specified matters relating to the case which are within the possession or control of an official or employee of any governmental agency, but which are not within the control of the prosecuting attorney. The prosecuting attorney shall use diligent good faith efforts to cause the official or employee to allow the defendant access at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made.

(2) Nontestimonial Evidence from Defendant on Defendant’s Motion. Upon motion of the defendant who has been arrested, cited or charged under these rules, the court for good cause shown may require the prosecuting attorney to provide for defendant to participate in a lineup, to speak for identification by witnesses or to participate in other procedures which would require a court order to accomplish.

(3) Other Relevant Material. Upon motion of the defendant, the trial court at any time before trial may, in its discretion, require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any relevant

material and information not subject to disclosure without order of court under Rule 9.01, subd. 1, provided, however, a showing is made that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged. If the motion is denied, the court upon application of the defendant shall inspect and preserve any such relevant material and information.

Subd. 3. Information Non-Discoverable. The following information shall not be discoverable by the defendant:

(1) Work Product.

(a) Opinions, Theories or Conclusions. Unless otherwise provided by these rules, legal research, records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of the prosecution staff or officials or official agencies participating in the prosecution.

(b) Reports. Except as provided in Rules 9.01, subd. 1(1) to (6), reports, memoranda or internal documents made by the prosecuting attorney or members of the prosecution staff or by prosecution agents in connection with the investigation or prosecution of the case against the defendant.

(2) Prosecution Witnesses Under Prosecuting Attorney's Certificate. The information relative to the witnesses and persons described in Rules 9.01, subd. 1(1), (2) shall not be subject to disclosure if the prosecuting attorney files a written certificate with the trial court that to do so may endanger the integrity of a continuing investigation or subject such witnesses or persons or others to physical harm or coercion, provided, however, that non-disclosure under this rule shall not extend beyond the time the witnesses or persons are sworn to testify at the trial.

Comment—Rule 9

See comment following Rule 9.03.

Rule 9.02 Disclosure by Defendant

Subd. 1. Information Subject to Discovery Without Order of Court. Without order of court, the defendant on request of the prosecuting attorney shall, before the date set for the Omnibus Hearing provided for by Rule 11, make the following disclosures:

(1) Documents and Tangible Objects. The defendant shall disclose and permit the prosecuting attorney to inspect and reproduce books, papers, documents, photographs, and tangible objects which the defendant intends to introduce in evidence at the trial or concerning which the defendant intends to offer evidence at the trial, and shall also permit the prosecuting attorney to inspect and reproduce reports on prospective jurors and to inspect and photograph buildings or places concerning which the defendant intends to offer evidence at trial.

(2) Reports of Examinations and Tests. The defendant shall disclose and permit the prosecuting attorney to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments and comparisons made in connection with the particular case within the possession or control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to testimony of the witness.

(3) Notice of Defense and Defense Witnesses and Criminal Record.

(a) Notice of Defense. The defendant shall inform the prosecuting attorney in writing of any defense, other than that of not guilty, on which the defendant intends to rely at the trial, including but not limited to the defense of self-defense, entrapment, mental illness or deficiency, duress, alibi, double jeopardy, statute of limitations, collateral estoppel, defense under Minn. Stat. § 609.035, or intoxication. The defendant shall supply the prosecuting attorney with the names and addresses of persons whom the defendant intends to call as witnesses at the trial together with their record of convictions, if any, within the defendant's actual knowledge.

A defendant who gives notice of intent to rely on the defense of mental illness or mental deficiency shall also notify the prosecuting attorney of any intent to additionally rely on the defense of not guilty.

(b) Statements of Defense and Prosecution Witnesses. The defendant shall permit the prosecuting attorney to inspect and reproduce any relevant written or recorded statements of the persons whom the defendant intends to call as witnesses at the trial and also statements of prosecution witnesses obtained by the defendant, defense counsel, or persons participating in the defense, and which are within the possession or control of the defendant and shall permit the prosecuting attorney to inspect and reproduce any written summaries within the defendant's knowledge of the substance of any oral statements made by such witnesses to defense counsel or obtained by the defendant at the direction of defense counsel. This provision does not require disclosure of the statements made by the defendant to defense counsel or agents of defense counsel that are protected by the attorney-client privilege or by state or federal constitutional guarantees.

(c) Alibi. If the defendant intends to offer evidence of an alibi, the defendant shall also inform the prosecuting attorney of the specific place or places where the defendant contends to have been when the alleged offense occurred and shall inform the prosecuting attorney of the names and addresses of the witnesses the defendant intends to call at the trial in support of the alibi.

As soon as practicable, the prosecuting attorney shall then inform the defendant of the names and addresses of the witnesses the prosecuting attorney intends to call at the trial to rebut the testimony of any of the defendant's alibi witnesses.

(d) Criminal Record. Defense counsel shall inform the prosecuting attorney of any prior convictions of the defendant provided the prosecuting attorney informs defense counsel of the record of prior convictions known to the prosecuting attorneys.

(e) Entrapment. A defendant who gives notice of intention to rely on the defense of entrapment, shall include in the notice a statement of the facts forming the basis for the defense, and elect whether to have the defense submitted to the court or to the jury.

The entrapment defense may not be submitted to the court unless the defendant waives jury trial upon that issue as provided by Rule 26.01, subd. 1(2).

If the entrapment defense is submitted to the court, the hearing thereon shall be included in the Omnibus Hearing under Rule 11 or in the evidentiary hearing provided for by Rule 12. The court shall make findings of fact and conclusions of law on the record supporting its decision.

Subd. 2. Discovery Upon Order of Court.

(1) Disclosures Permitted. Upon motion of the prosecuting attorney with notice to defense counsel and a showing that one or more of the discovery procedures hereafter described will be of material aid in determining whether the defendant committed the offense charged, the trial court at any time before trial may, subject to constitutional limitations, order a defendant to:

(a) Appear in a lineup;

(b) Speak for identification by witnesses to an offense or for the purpose of taking voice prints;

(c) Be fingerprinted or permit the defendant's palm prints or footprints to be taken;

(d) Permit measurements of the defendant's body to be taken;

(e) Pose for photographs not involving re-enactment of a scene;

(f) Permit the taking of samples of the defendant's blood, hair, saliva, urine, and other materials of the defendant's body which involve no unreasonable intrusion thereof; provided, however, that the court shall not permit a blood test to be taken except upon a showing of probable cause to believe that the test will aid in establishing the guilt of the defendant;

(g) Provide specimens of the defendant's handwriting; and

(h) Submit to reasonable physical or medical inspection of the defendant's body.

(2) Notice of Time and Place of Disclosures. Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place thereof shall be given by the prosecuting attorney to defense counsel.

(3) Medical Supervision. Blood tests shall be conducted under medical supervision, and the court may require medical supervision for any other test ordered pursuant to this rule when the court deems such supervision necessary. Upon motion of the defendant, the court may order the defendant's appearance delayed for a reasonable time or may order that it take place at the defendant's residence, or some other convenient place.

(4) Notice of Results of Disclosure. Unless otherwise ordered by the court, the prosecuting attorney, within five (5) days from the date the results of the discovery procedures provided by this rule become known, shall make available to defense counsel a report of the results.

(5) Other Methods Not Excluded. The discovery procedures provided for by this rule do not exclude other lawful methods available for obtaining the evidence discoverable under the rule.

Subd. 3. Information Not Subject to Disclosure by Defendant; Work Product. Unless otherwise provided by these rules, legal research, records, correspondence, reports or memoranda to the extent they contain the opinions, theories, or conclusions of the defendant or defense counsel or persons participating in the defense are not subject to disclosure.

Subd. 4. Failure to Call Witness. The fact that a witness' name is on a list furnished by defendant to the prosecution under this rule shall not be commented on in the presence of the jury.

Comment—Rule 9

See comment following Rule 9.03.

Rule 9.03 Regulation of Discovery

Subd. 1. Investigations Not to be Impeded. Except as otherwise provided as to matters not subject to discovery or covered by protective orders, neither the counsel for the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel or from showing opposing counsel any relevant materials, nor shall they otherwise impede opposing counsel's investigation of the case.

Subd. 2. Continuing Duty to Disclose.

(a) If subsequent to compliance with any discovery rule or order, a party discovers additional material, information or witnesses subject to disclosure, that party shall promptly notify the other party of the existence of the additional material or information and the identity of the witnesses.

(b) Each party shall have a continuing duty at all times before and during trial to supply the materials and information required by these rules.

Subd. 3. Time, Place and Manner of Discovery and Inspection. An order of the court granting discovery shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

Subd. 4. Custody of Materials. Any materials furnished to an attorney under discovery rules or orders shall remain in the custody of and be used by the attorney only for the purpose of conducting that attorney's side of the case, and shall be subject to such other terms and conditions as the court may prescribe.

Subd. 5. Protective Orders. Upon a showing of cause, the trial court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate. All material and information to which a party is entitled must be disclosed in time to afford counsel the opportunity to make beneficial use of it.

Subd. 6. In Camera Proceedings. Upon application of any party with notice to the adverse party, the trial court upon a showing of good cause therefor may permit any showing of cause for denial or regulation of discovery, or portion of such showing, to be made in camera. A record shall be made of the proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the reviewing court in the event of an appeal, habeas corpus proceedings, or post-conviction proceedings under Minn. Stat. §§ 590.01- 590.06 (1971).

Subd. 7. Excision. When some parts of certain material are discoverable under these rules, and other parts not discoverable, as much of the material shall be disclosed as is consistent with discovery rules. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court to be made available to the reviewing court in the event of an appeal, habeas corpus proceeding, or post-conviction proceedings under Minn. Stat. §§ 590.01- 590.06 (1971).

Subd. 8. Sanctions. If at any time it is brought to the attention of the trial court that a party has failed to comply with an applicable discovery rule or order, the court may

upon motion and notice order such party to permit the discovery or inspection, grant a continuance, or enter such order as it deems just in the circumstances. Any person who willfully disobeys a court order under these discovery rules may be held in contempt.

Subd. 9. Filing. Unless the court orders otherwise for the purpose of a hearing or trial, discovery disclosures made pursuant to Rule 9 shall not be filed under the provisions of Rule 33.04.

The party making the disclosures shall prepare an itemized descriptive list identifying the disclosures without disclosing their contents and shall file the list as provided by Rule 33.04.

Subd. 10. Reproduction. Whenever a party has an obligation to permit reproduction of a report, statement, document or other tangible thing, discoverable under this rule, that obligation may be satisfied by any method that provides to the other party an exact reproduction of that item, including E-mail, facsimile transmission, or similar method if that method is available to both parties. A reasonable charge may be made to cover the actual costs of reproduction, except that no charge may be assessed to a defendant represented by the public defender or by an attorney working for a public defense corporation under Minn. Stat. § 611.216 or to a defendant determined by the court to be financially unable to obtain counsel pursuant to Rule 5.02.

Comment—Rule 9

Rule 9, with Rules 7.01, 19.04, subd. 6(1) (Rasmussen notice of evidence obtained from the defendant and of identification procedures), Rules 7.02, 19.04, subd. 6(2) (Spreigl notice of additional offenses to be offered at trial), and Rule 18.05, subds. 1 and 2 (recorded testimony of grand jury witnesses), provide a comprehensive method of discovery by the prosecution (Rule 9.01) and defendant (Rule 9.02). The rules are intended to give the defendant and prosecution as complete discovery as is possible under constitutional limitations.

It is the object of the rules that these discovery procedures shall be completed so far as possible by the time of the Omnibus Hearing under Rule 11, which will be held within 42 days after the defendant's first appearance in court following a complaint under Rule 5, where the Rule 5 and Rule 8 appearances are not consolidated, or within 14 days after the first appearance in district court following an indictment (Rule 19.04) and that all issues arising from the discovery process, including the need for additional discovery, will be resolved at the Omnibus Hearing (Rules 11.04; 9.01, subd. 2; 9.03, subd. 8).

While a pre-trial conference originally was not specifically provided for by these rules (Compare ABA Standards, Discovery and Procedure Before Trial, 5.4 (Approved Draft, 1970) containing a specific provision for a pre-trial conference), Rule 11.04 now expressly permits the court in its discretion to hold a pre-trial dispositional conference as a part of the Omnibus Hearing if it determines there is a need for it. (See F.R.Crim.P. 17.1.)

Rule 9.01, subd. 1 provides for the disclosures that shall be made before the Omnibus Hearing by the prosecution upon request of the defense without an order of court. As to the prosecution's duty to disclose under the rule see State v. Smith, 313

N.W.2d 429 (Minn.1981), State v. Zeimet, 310 N.W.2d 552 (Minn.1981), State v. Schwantes, 314 N.W.2d 243 (Minn.1982), and State v. Hall, 315 N.W.2d 223 (Minn.1982).

Rule 9.01, subd. 1 provides generally for access by defense counsel to unprotected materials in the prosecution file and also for numerous specific disclosures which must be made by the prosecuting attorney upon request of defense counsel. The general "open file" policy established by the rule is based on Unif.R.Crim.P. 421(a) (1987). Of course, this "open file" policy does not require the prosecuting attorney to give defense counsel access to any information that would be deemed non-discoverable under Rule 9.01, subd. 3.

No specific form of request is required by Rule 9.01, subd. 1. It is anticipated that the discovery provided for by Rule 9.01, subd. 1 as well as the disclosures required of the defense by Rule 9.02 without order of court will be accomplished informally between the prosecuting attorney and defense counsel. (See ABA Standards, Discovery and Procedure Before Trial, 1.3(a), 1.4(b) (Approved Draft, 1970).)

Rule 9.01, subd. 1(1)(a), providing for the discovery of the prosecution's trial witnesses, with their written or recorded statements and written summaries of oral statements, and their criminal records, substantially follows ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(i)(ii)(vi) (Approved Draft, 1970) and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(a)(i)(vi) (1970) (48 F.R.D. 553, 587-589). The policy of this rule is to permit discovery of "written and recorded statements in whatever form they may have been preserved". (See Comments ABA Standards, Discovery and Procedure Before Trial, 2.1, p. 62 (Approved Draft, 1970).)

Discovery under Rule 9.01, subd. 1(1)(a) is subject to the provisions of Rule 9.01, subd. 3(2) (prosecutor's certificate for the protection of witnesses) and Rule 9.03, subd. 5 (protective orders).

Rule 9.01, subd. 1(1)(b), forbidding comment to the jury on the fact that a person was named on the list of prosecution witnesses, is taken from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(4) (1970) (48 F.R.D. 553, 590). This rule is not intended to affect any right defense counsel may have by existing law to comment on the fact that the prosecution has failed to call a particular witness, but prevents defense counsel from commenting on the fact that the witness was on the prosecution's list.

Rule 9.01, subd. 1(1)(c), requiring the prosecution to disclose the names and addresses of grand jury witnesses, is in accord with the requirements of existing law (Minn. Stat. § 628.08 (1971)). Rule 18.05, subd. 2 provides the method for discovery of their grand jury testimony. (This follows substantially the recommendations of ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(iii) (Approved Draft, 1970).)

Rule 9.01, subd. 1(1)(d) requiring the disclosure of the names of all persons having information related to the case is taken from Unif.R.Crim.P. 421(a) (1987). Additionally, the other specific items required to be disclosed by Unif.R.Crim.P. 421(a) (1987) are included in Rule 9.01, subd. 1.

Rule 9.01, subd. 1(2), as originally promulgated followed substantially ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(ii) (Approved Draft, 1970). As

revised it is in accord with Unif.R.Crim.P. 421(a) and requires the disclosure of written or recorded statements of all persons (whether or not the statements will be offered in evidence) and also requires disclosure of the substance of any oral statements which relate to the case.

Rule 9.01, subd. 1(2) differs from ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(ii) (Approved Draft, 1970) in that the rule covers the written or recorded statements of accomplices and co-defendants whether or not they are to be tried jointly with the defendant.

Rule 9.01, subd. 1(3), providing for discovery of documents and tangible objects, was originally taken from ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(v) (Approved Draft, 1970), Fed.R.Crim.P. 16(6), and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(iv) (1970), 48 F.R.D. 553, 588 to 599. It has been broadened based on Unif.R.Crim.P. 421(a) (1987) to include grand jury minutes or transcripts, law enforcement officer reports, and reports on prospective jurors. Additionally, the items which must be disclosed need only relate to the case, whether or not the prosecuting attorney intends to offer evidence about them at trial. This rule permits the defendant to obtain from the prosecuting attorney grand jury transcripts possessed by the prosecuting attorney. If the defendant wants portions of the grand jury record not yet transcribed or possessed by the prosecuting attorney, it is necessary to request that of the court under Rule 18.05 and to meet the standards under that rule.

Rule 9.01, subd. 1(4) for discovery of reports of examinations and tests follows F.R.Crim.P. 16(a)(2) and ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(iv) (Approved Draft, 1970). The provision in this rule for reasonable tests by the defendant is taken from Unif.R.Crim.P. 421(a) (1987). If a test or experiment done by the prosecution does not destroy the evidence and preclude further tests or experiments, it is not necessary under this rule to notify the defendant or to allow a defense expert to observe the test or experiment.

Rule 9.01, subd. 1(5) and Rule 9.02, subd. 1(3)(d) providing for reciprocal discovery of the defendant's criminal record between prosecution and defendant is taken from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(a)(1)(iii) (1970) 48 F.R.D. 553, 588.

Rule 9.01, subd. 1(5) also provides for the reciprocal discovery of the criminal records of any defense witness disclosed to the prosecution under Rule 9.02, subd. 1(3)(a). Under Rule 9.03, subd. 2 there is a continuing duty to disclose such information up through trial. If the prosecutor intends to impeach the defendant or any defense witnesses with evidence of prior convictions the prosecutor is required by State v. Wenberg, 289 N.W.2d 503 (Minn.1980) to request a pretrial hearing on the admissibility of such evidence under the Rules of Evidence. The pretrial hearing may be made a part of the Omnibus Hearing under Rule 11 or the pretrial conference under Rule 12. See Rule 609 of the Minnesota Rules of Evidence for the standards governing the use of criminal convictions to impeach a witness.

Rule 9.01, subd. 1(6) provides for the pre-trial disclosure of exculpatory material which is constitutionally required at trial. (See Brady v. Maryland, 373 U.S. 83, 87-88 (1963); ABA Standards, Discovery and Procedure Before Trial, 2.1(c) (Approved Draft, 1970).)

Rule 9.01, subd. 1(7) requires the prosecuting attorney to disclose to the defendant or defense counsel all evidence not otherwise disclosed upon which the prosecuting attorney intends to rely in seeking an aggravated sentence under Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004). The prosecuting attorney also has a continuing duty to disclose such evidence under Rule 9.03, subd. 2. See Rule 1.04(d) for the definition of "aggravated sentence" and also see the comments to that rule.

The scope of the prosecutor's obligations (Rule 9.01, subd. 1(8)) to make the disclosure required by Rule 9.01, subd. 1 is taken from ABA Standards, Discovery and Procedure Before Trial, 2.1(d) (Approved Draft, 1970).

Rule 9.01, subd. 2 provides for additional discretionary disclosure upon order of the court. A motion seeking such an order must be served on the other party as required by Rules 10.04, subd. 1 and 33.01. The first paragraph of Rule 9.01, subd. 2 requires the prosecuting attorney under certain circumstances to assist the defendant in seeking access to materials related to the case which are in the control of other governmental agencies. This provision of the rule does not allow a defendant access to materials possessed by other governmental agencies that are protected by the Minnesota government data practices act in Minn. Stat. Ch. 13 or by other legislation. This provision is similar to Unif.R.Crim.P. 421(d) (1987) except that under Rule 9.01, subd. 2 a court order is required upon a showing of good cause. The second paragraph of this rule permitting the defendant to request the court to order a lineup, voice identification test or similar procedure requiring a court order is based on Unif.R.Crim.P. 435 (1987) and ALI Model Code of Pre-Arraignment Procedure § 170.2(8) (1975). The defendant who is convinced that such nontestimonial evidence would "clear" him or her may desire to proceed under this rule, although most nontestimonial evidence procedures could be conducted by the defendant without using this rule. Reference is made to the defendant being arrested or cited because there may be need to obtain nontestimonial evidence before a complaint is filed. The standard for issuing the order differs slightly from that utilized in Rule 9.02, subd. 2(1) upon a similar motion by the prosecuting attorney. The "good cause" standard used here minimizes the possibility that the defendant will be required to offer potentially incriminating evidence in order to utilize this rule. The third paragraph of Rule 9.01, subd. 2, following ABA Standards, Discovery and Procedure Before Trial, 2.5(a) (Approved Draft, 1970), permits disclosure by order of court of relevant material not covered by Rule 9.01, subd. 1. This rule does not permit the discovery of material non-discoverable under Rule 9.01, subd. 3 and is not intended as one of the exceptions referred to in Rule 9.01, subd. 3(1)(a).

Requests or motions for discovery under Rule 9.01, subd. 2 should be made before (Rule 10.04) or at the Omnibus Hearing under Rule 11 (Rules 11.03, 11.04).

Rule 9.01, subd. 3 enumerates the material that is not discoverable from the prosecution.

Rule 9.01, subd. 3(1)(a), defining non-discoverable work product is taken from ABA Standards, Discovery and Procedure Before Trial, 2.6(a) (Approved Draft, 1970) and excludes material containing opinions, theories, or conclusions of the prosecutor and the prosecution staff and official investigators with the exception of the material specifically made discoverable by Rule 9.01, subd. 1. Rule 9.01, subd. 2 providing for discretionary discovery by order of court is not intended as one of the exceptions to the

work product rule.

Rule 9.01, subd. 3(1)(b), following substantially F.R.Crim.P. 16(b), excludes from discovery internal prosecution reports with the exception of the material specifically covered by Rule 9.01, subd. 1.

Rule 9.01, subd. 3(2), precluding discovery of the identity and statements of prosecution witnesses and those persons referred to in Rule 9.01, subd. 1(1) and (2) if the prosecutor certifies that they or other persons may be subject to harm, is taken from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(vi) (1970) 48 F.R.D. 553, 589. ABA Standards, Discovery and Procedure Before Trial, 2.5(b) (Approved Draft, 1970) authorizes the court to deny discretionary disclosure in similar circumstances. The prohibition contained in this rule does not extend beyond the time when the witnesses are sworn to testify at the trial, thus continuing in Minnesota the application of the Jencks rule (353 U.S. 657 (1957)). (See State v. Thompson, 273 Minn. 1, 139 N.W.2d 490, 508-512 (1966), State v. Grunau, 273 Minn. 315, 141 N.W.2d 815, 823 (1966).) This rule does not prohibit discovery of a defendant's own statement.

Rule 9.02, covering disclosure by the defendant, is based upon ABA Standards, Discovery and Procedure Before Trial, 3.1, 3.2, 3.3 (Approved Draft, 1970). (See also Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(b)(1) (1970), 48 F.R.D. 553, 591.) The sanctions and remedies for failure of the prosecution or defense to make discovery are provided for by Rule 9.03, subd. 8.

Rule 9.02, subd. 1 lists the information and material the defendant shall disclose without order of court before the Omnibus Hearing (Rule 11) on request of the prosecution.

Rule 9.02, subd. 1(1) for disclosure of documents and tangible objects to be introduced at trial follows the original language of the parallel rule (Rule 9.01, subd. 1(3)) for prosecution disclosure of similar material. (See F.R.Crim.P. 16(c); Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(b)(1)(i) (1970), 48 F.R.D. 553, 591.) The requirement to disclose reports on prospective jurors does not require disclosure of opinions or conclusions concerning jurors given by persons assisting counsel on the case. Such material would be protected as work product under Rule 9.02, subd. 3.

Rule 9.02, subd. 1(2) for disclosure of reports of examinations and tests follows the parallel prosecution disclosure rule (Rule 9.01, subd. 1(4)), except that under Rule 9.02, subd. 1(2) the information subject to defense disclosure is restricted to that to be offered at trial. This restriction on mandatory disclosure by the defendant was considered necessary to avoid the possibility of infringement on the privilege against self-incrimination. (See Jones v. Superior Court of Nevada County, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); Williams v. Florida, 399 U.S. 78 (1970); ABA Standards, Discovery and Procedure Before Trial, 3.2 (Approved Draft, 1970); Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(b)(1)(ii) (1970), 48 F.R.D. 553, 591.)

Rule 9.02, subd. 1(3)(b) for disclosure of the statements of defense trial witnesses also follows the parallel prosecution disclosure Rule 9.01, subd. 1(1)(a). Rule 9.02, subd. 1(3)(b), which requires the defense to disclose statements of defense and

prosecution witnesses, does not require the disclosure of a defendant's statements made to defense counsel or agents of defense counsel where such information is protected by state and federal constitutional guarantees or the attorney-client privilege. See Minn. Stat. § 595.02, subd. 1(b).

Rule 9.02, subd. 1(3)(a) requires written notice of any defense other than not guilty on which the defendant intends to rely at the trial with the names and addresses of the witnesses the defendant intends to call at the trial. This rule is based on ABA Standards, Discovery and Procedure Before Trial, 3.3 (Approved Draft, 1970). The defendant is not required to indicate the witnesses intended to be used for each defense except in the case of the defense of alibi (Rule 9.02, subd. 1(3)(c)). Illustrations of the kinds of defenses requiring notice are set forth in Rule 9.02, subd. 1(3)(a). (See Williams v. Florida, 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446 (1970) sustaining the constitutionality of the Florida notice-of-alibi statute.) (This rule expands present Minnesota statutory law covering notice of alibi. Minn. Stat. § 630.14 (1971).)

Under Rule 9.02, subd. 1(3)(a), a defendant who gives notice of intention to rely on the defense of mental illness or mental deficiency, shall notify the prosecution of any intention to rely also on the defense of not guilty. This notice is necessary for the purposes of Rule 20.02, subd. 6(1) and (2) governing the procedure following a mental examination when the defense is mental illness or mental deficiency.

In addition to Rule 9.02, subd. 1(3)(a), case law may establish notice requirements with which a defendant must comply in order to raise certain defenses. In State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975), the Court established the requirement that a defendant raising the defense of entrapment must notify the trial court and the prosecutor of the basis for the defense in reasonable detail and whether the defendant elects to have the issue of entrapment tried to the court or to a jury.

Rule 9.02, subd. 1(3)(d) for disclosure of the defendant's criminal record is similar to Rule 9.01, subd. 1(5) for prosecution disclosure of the record.

The procedures set forth in Rule 9.02, subd. 1(3)(e) for asserting the entrapment defense are taken from State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975). That case further requires that upon submission of the defense to court or jury, the defendant has the burden of proving by a fair preponderance of the evidence inducement by government agents to commit the crime charged, whereupon the burden rests on the state to prove beyond a reasonable doubt predisposition by defendant to commit the offense.

If the defendant asserts the defense of violation of due process with the entrapment defense or separately, the defense shall be heard and determined by the court. The concept of fundamental fairness inherent in the due process requirement will prevent conviction of even a predisposed defendant if the conduct of the government in participating in or inducing the commission of the crime is outrageous. As to this due process defense see Hampton v. United States, 425 U.S. 484, 96 S.Ct. 1646, 48 L.Ed.2d 113 (1976), State v. Ford, 276 N.W.2d 178 (Minn.1979), and State v. Morris, 272 N.W.2d 35 (Minn.1978).

Rule 9.02, subd. 2, requiring the defendant upon order of court to personally submit to the non-testimonial identification and other procedures described in the rule, is

based upon ABA Standards, Discovery and Procedure Before Trial, 3.1 (Approved Draft, 1970) and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 41.1 (1971), 52 F.R.D. 409, 462-467. (See also, Schmerber v. California, 384 U.S. 757 (1966), Davis v. Mississippi, 394 U.S. 721, 727-728 (1969).) This rule is intended to be applicable only after an indictment has been returned, or a complaint filed upon which probable cause for the arrest of the defendant has been found.

Following indictment, the order under Rule 9.02, subd. 2 may be obtained from the district court at any time before trial, but preferably it should be sought at or before the Omnibus Hearing under Rule 11.

Following a complaint charging a felony or gross misdemeanor, the order may be obtained at the first appearance of the defendant under Rules 4.02, subd. 5(1) and 5, or at or before the Omnibus Hearing under Rule 11 from the court before which that hearing is held. It may be obtained from the district court at any time before trial, but preferably at or before the Omnibus Hearing.

Rule 9.02, subd. 2(2), requiring notice to defense counsel of the time and place for the personal appearance of the defendant, would include the defendant if the defendant represents herself or himself or is unrepresented. This rule is taken from ABA Standards, Discovery and Procedure Before Trial, 3.1(b) (Approved Draft, 1970).

Rule 9.02, subd. 2(3) providing for medical supervision and for modifications of the order as to time and place is based on Preliminary Draft of Proposed Amendments to F.R.Crim.P. 41.1(e)(i) (1971), 52 F.R.D. 409, 464-465.

Rule 9.02, subd. 2(4), providing for notice to defense counsel of the results of the examination, is based on Preliminary Draft of Proposed Amendments to F.R.Crim.P. 41.1(j) (1971), 52 F.R.D. 409, 465.

Rule 9.02, subd. 2(5) provides that the method prescribed by Rule 9.02, subd. 2 for obtaining the identification and other evidence from the defendant under order of court is not intended to exclude other lawful measures, such as a lawful search and seizure, by which the evidence may be obtained.

Rule 9.02, subd. 3, paralleling the language of Rule 9.01, subd. 3(1)(a) governing work product of the prosecution, defines the work product that is not subject to disclosure by the defendant, except as provided in Rules 9.02, subds. 1, 2 and 3.

Rule 9.03, governing the regulation of discovery is based on ABA Standards, Discovery and Procedure Before Trial, 4.1-4.7 (Approved Draft, 1970) and F.R.Crim.P. 16(e)(g).

Rule 9.03, subd. 1 follows substantially the language of ABA Standards, Discovery and Procedure Before Trial, 4.1 (Approved Draft, 1970) protecting interference with discovery.

The first sentence of Rule 9.03, subd. 2 providing for a continuing duty of disclosure is taken from ABA Standards, Discovery and Procedure Before Trial, 4.2 (Approved Draft, 1970) and F.R.Crim.P. 16(g). The second sentence is intended to make

it clear that each party has a continuing duty before and at trial to make the disclosures required by Rules 9.01, subd. 1 and 9.02, subd. 1 regardless of whether the party has previously made discovery under the rules or on order of court. A party who fails to make discovery when under a duty to do so may be ordered to comply under Rule 9.03, subd. 8.

Rule 9.03, subd. 3, governing court orders for regulation of discovery, is taken from F.R.Crim.P. 16(d).

Rule 9.03, subd. 4, providing for the custody of discovered materials, comes from ABA Standards, Discovery and Procedure Before Trial, 4.3 (Approved Draft, 1970).

Rule 9.03, subd. 5, authorizing protective orders, follows ABA Standards, Discovery and Procedure Before Trial, 4.4 (Approved Draft, 1970). (See also F.R.Crim.P. 16(e).) In commenting on this standard (see Comment ABA Standards, Discovery and Procedure Before Trial, 4.4, p. 101 (Approved Draft, 1970)) the Committee stated as follows: "This standard permits application by the party concerned to the court for a protective order which can be tailored to the particular circumstances of the case. It is anticipated that it will ordinarily be needed with respect to those matters for which discovery is mandated, rather than matters where the court in the first instance can exercise discretion upon application of the defense and thus take exceptional circumstances into account at that time."

In making protective orders under Rule 9.03, subd. 5 or in ruling on motions to compel discovery under Rules 9.01, subd. 2 and 9.03, subd. 8, the court may avail itself of Rule 9.03, subd. 6 and subd. 7 authorizing in camera proceedings and excision.

Rule 9.03, subd. 6 and subd. 7 are taken from ABA Standards, Discovery and Procedure Before Trial, 4.5 and 4.6 (Approved Draft, 1970) and F.R.Crim.P. 16(e).

Rule 9.03, subd. 8 providing for sanctions follows ABA Standards, Discovery and Procedure Before Trial, 4.7 (Approved Draft, 1970).

Under Rule 9.03, subd. 10, the obligation of the defendant or the prosecutor to permit reproduction of items discoverable under Rule 9 may be satisfied not just by photocopying, but also by any other existing or future technology that permits transmission of an exact reproduction of the item. This would include E-mail or facsimile transmission if the other party has the equipment necessary to receive such transmissions. The provision in this rule permitting free copies to public defenders and attorneys working for public defense corporations under Minn. Stat. § 611.216 is in accord with Minn. Stat. § 611.271.

Rule 10. Pleadings and Motions Before Trial; Defenses and Objections

Rule 10.01 Pleadings and Motions

Pleadings in criminal proceedings shall be by the indictment, complaint or tab charge and the pleas prescribed by these rules. Defenses, objections, issues, or requests which are capable of determination without trial on the merits shall be asserted or made before trial by a motion to dismiss or to grant appropriate relief.

Comment—Rule 10

See comment following Rule 10.04.

Rule 10.02 Motions Attacking Jurisdiction of the Court in Misdemeanor Cases

A motion to dismiss for want of personal jurisdiction shall not be made until after a complaint is filed and a not guilty plea entered unless the motion is heard and determined summarily. Notice of such a motion shall be given either orally on the record in court or in writing to the prosecution. Such notice shall be given no more than seven (7) days after entry of the not guilty plea or any challenge to the personal jurisdiction of the court is waived unless the court for good cause shown grants relief from the waiver. The motion shall be served, heard and determined.

Comment—Rule 10

See comment following Rule 10.04.

Rule 10.03 Waiver

The motion shall include all defenses, objections, issues and requests then available to the moving party. Failure to include any of them in the motion constitutes a waiver thereof, but the court for good cause shown may grant relief from the waiver. However, lack of jurisdiction over the offense or the failure of the indictment or complaint to charge an offense shall be noticed by the court at any time during the pendency of the proceeding. The defendant does not waive any defenses or objections by including them in any motion with other defenses, objections or issues.

Comment—Rule 10

See comment following Rule 10.04.

Rule 10.04 Service of Motions; Hearing Date

Subd. 1. Service. In felony and gross misdemeanor cases, motions shall be made in writing and served upon opposing counsel not later than three (3) days before the Omnibus Hearing unless the court for good cause shown permits the motion to be made and served at a later time.

In misdemeanor cases, except as otherwise permitted by Rule 10.04, subd. 2, motions shall be made in writing and along with any supporting affidavits shall be served upon opposing counsel at least three (3) days before they are to be heard and no more than thirty (30) days after the arraignment unless the court for good cause shown permits the motion to be made and served at a later time.

Subd. 2. Hearing Date. In felony and gross misdemeanor cases, unless the motion is served after the Omnibus Hearing, it shall be heard at that hearing and shall be determined as provided by Rule 11.07.

In misdemeanor cases, if a pretrial conference is held, the motion shall be heard

there unless the court directs otherwise for the purpose of hearing witnesses or for other good cause. If the motion is not heard at a pretrial conference, it shall be heard immediately prior to trial, provided that the court may upon agreement by the prosecutor and defense counsel summarily hear and determine the motion at arraignment. If the motion is heard at the arraignment, it need not be in writing, but a record shall be made of the proceedings and in the court's discretion witnesses may be called. The motion shall be determined before trial as provided by Rule 12.07.

Comment—Rule 10

Under Rule 10.01 the prosecution's pleadings consist of the indictment, complaint or tab charge. (The filing of a complaint does not, however, preclude an indictment (Rule 17.01).) The complaint continues to be the accusatory pleading for misdemeanors and also takes the place of the information (Minn. Stat. § 628.29 (1971)) for felonies and gross misdemeanors.

As provided by Rule 14 the defendant's pleadings are the pleas of guilty, not guilty, not guilty by reason of mental illness or mental deficiency, and double jeopardy, or that prosecution is barred by Minn. Stat. § 609.035 (1971). The entry of any of these pleas does not relieve the defendant of the requirements of Rule 9.02, subd. 1(3)(a) for service of notice of the defenses on which the defendant intends to rely. Rule 14 adopts the pleas provided by Minn. Stat. § 630.28 except for the bar of § 609.035, and except that the plea of not guilty by reason of mental illness or deficiency is added for the purposes of Rule 20.02 governing the procedures upon a defense of mental illness or mental deficiency.

That portion of Rule 10.01 providing that all pre-trial defenses, objections, and requests, determinable without trial on the merits, shall be asserted by motion to dismiss or to grant appropriate relief is taken from F.R.Crim.P. 12. The motion to dismiss or to grant appropriate relief will take the place of the demurrer (Minn. Stat. §§ 630.22, 630.23 (1971)) and motion to quash or set aside the indictment (Minn. Stat. § 630.18 (1971)). (See also, Rules 18.02, subd. 2; 17.06, subd. 2). The rule does not require pre-trial motions to be made before a plea is entered.

Rule 5.04, subd. 5 abolishes special appearances as the method for challenging the personal jurisdiction of the court and Rule 10.02 establishes a different procedure for making such a challenge. As to the basis for such a challenge see City of St. Paul v. Webb, 256 Minn. 210, 97 N.W.2d 638 (1959).

As a general rule under Rule 10.02 no challenge to the personal jurisdiction of the court may be made in a misdemeanor case until after a complaint has been filed. Therefore, a defendant who has been tab charged, must first demand a complaint under Rule 4.02, subd. 5(3) before raising the jurisdictional challenge. If no complaint is issued, the charge must be dismissed under Rule 4.02, subd. 5(3). If a complaint is issued, it will often make any possible challenge moot, since a valid complaint would give the court jurisdiction even if the arrest was illegal. See City of St. Paul v. Webb, supra. Once the complaint is issued, the jurisdictional challenge becomes a question of the sufficiency of the complaint.

Rule 10.02 also provides that a motion to dismiss for want of personal jurisdiction shall be made after entry of a not guilty plea, and the entry of that plea does

not waive the jurisdictional challenge. This reverses prior Minnesota case law providing that any plea waived a challenge to the court's jurisdiction. See State v. Stark, 288 Minn. 286, 179 N.W.2d 597 (1970); State v. Mastrian, 285 Minn. 51, 171 N.W.2d 695 (1969); State v. Burch, 285 Minn. 300, 170 N.W.2d 543 (1969). But see also State v. Harbitz, 293 Minn. 224, 198 N.W.2d 342 (1972) where the defendant following a trial on the merits was permitted to challenge on appeal the trial court's denial of the defendant's pretrial motion to quash an improper indictment.

To initiate the challenge to the court's personal jurisdiction, notice must be given that a motion to dismiss for want of personal jurisdiction will be made. This notice must be given no more than 7 days after entry of the not guilty plea or the challenge is waived unless the court for good cause shown grants relief from the waiver. The notice may be given either orally in court or in writing directly to the prosecution. The challenge then proceeds as in any other motion to dismiss under Rule 10.04. Therefore, under Rule 10.04, subd. 1, a written motion together with any necessary affidavits must be served at least three days before the motion is to be heard and no more than 30 days after the arraignment. Under Rule 10.04, subd. 2 if a pretrial is held, the motion is normally heard there based on affidavits if available. If it is necessary to hear testimony on the matter, or for other good cause, the motion need not be heard at the pretrial. If the motion is not heard at the pretrial, it will be heard immediately prior to trial when any necessary witnesses will most likely be present.

If the defendant's motion to dismiss is denied, Rule 17.06, subd. 4(1) provides that the defendant may continue to raise the jurisdictional issue on direct appeal if convicted following a trial. This procedure avoids the necessity of seeking review by an extraordinary writ which oftentimes would delay a trial otherwise ready to proceed. This procedure reverses prior case law. See State v. Stark, supra.

Rule 10.03 providing for waiver of defenses, objections, and requests not included in a motion under Rule 10.01 and then available--except lack of jurisdiction or failure to charge an offense (See also Minn. Stat. § 630.27 (1971).)--is based on ABA Standards, Discovery and Procedure Before Trial, 5.3(b) (Approved Draft, 1970) and substantially follows the language of F.R.Crim.P. 12(b)(2).

The effect of a determination of a motion to dismiss under this rule is covered by Rule 17.06, subd. 4.

That portion of Rule 10.03 providing that the defendant does not waive defenses and objections by including them with other defenses and objections is based on Minn.R.Civ.P. 12.02.

Under Rule 10.04, subd. 1 and subd. 2, the pre-trial motions shall be in writing and shall be served upon opposing counsel not later than three (3) days before the Omnibus Hearing to be held under Rule 11 (unless the time is extended for good cause) in order that the issues raised by the motion may be heard at that hearing as provided by Rule 11.03. Rule 10.04, subd. 1 should not prevent the court from hearing at the Omnibus Hearing on the court's initiative (See Rule 11.04.) those issues which first appear or arise at that time if the parties do not need additional time to prepare.

Under Rule 10.04, subd. 2, pre-trial motions heard at the Omnibus Hearing and those heard afterward shall be determined by the time as provided by Rule 11.07, which

requires the Omnibus Hearing to be completed and all issues decided within 30 days after the defendant's appearance under Rule 8 unless a later time is justified by good cause related to the particular case. In misdemeanor cases, under Rule 10.04, subd. 2, pre-trial motions shall be determined as provided by Rule 12.07.

Rule 10.04, subd. 2 also provides in misdemeanor cases an alternative method for disposing of a motion to dismiss (including a motion to dismiss for want of personal jurisdiction) at the time of arraignment. If agreed to by the prosecutor and defense counsel, the court may summarily hear and determine a motion to dismiss at the arraignment. In such cases the motion need not be in writing, but a record shall be made of the proceedings and, in the court's discretion, witnesses may be called. For those cases in which there is no dispute over the facts, and the law can be quickly and adequately argued, this alternative procedure could provide an immediate disposition avoiding the delay and expense of further court appearances.

Rule 11. Omnibus Hearing in Felony and Gross Misdemeanor Cases

If the defendant does not plead guilty in a felony case at the initial appearance under Rule 8 or, in a gross misdemeanor case at the first appearance under Rule 5 or at the initial appearance under Rule 8, a hearing shall be held as follows:

Rule 11.01 Place of Hearing

The hearing shall be held in the district court in the judicial district wherein the alleged offense was committed.

Comment—Rule 11

See comment following Rule 11.11.

Rule 11.02 Hearing on Evidentiary Issues

Subd. 1. Evidence. If the defendant or prosecution has demanded a hearing on either of the issues specified by Rule 8.03, the court shall hear and determine them upon such evidence as may be offered by the prosecution or the defense. If either party offers into evidence a videotape or audiotape exhibit, that party may also provide to the court a transcript of the proposed exhibit which will be made a part of the record.

Subd. 2. Cross-Examination. Upon such hearing, the defendant and the prosecution may cross-examine the other's witnesses.

Comment—Rule 11

See comment following Rule 11.11.

Rule 11.03 Motions

The court shall hear and determine all motions made by the defendant or prosecution, including a motion that there is an insufficient showing of probable cause to believe that the defendant committed the offense charged in the complaint, and receive such evidence as may be offered in support or opposition. Each party may cross-examine

any witnesses produced by the other. A finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part. Evidence considered on the issue of probable cause shall be subject to the requirements of Rule 18.06, subd. 1.

Comment—Rule 11

See comment following Rule 11.11.

Rule 11.04 Other Issues

The Omnibus Hearing may include a pretrial dispositional conference to determine whether the case can be resolved without scheduling it for trial. The court shall ascertain any other constitutional, evidentiary, procedural or other issues that may be heard or disposed of before trial and such other matters as will promote a fair and expeditious trial, and shall hear and determine them, or continue the hearing for that purpose as permitted by Rule 11.07.

If the prosecution has given notice under Rule 7.02 of intention to offer evidence of additional offenses, upon motion a hearing shall be held to determine their admissibility under Rule 404(b) of the Minnesota Rules of Evidence and whether there is clear and convincing evidence that defendant committed the offenses.

If the prosecutor has given notice under Rule 7.03 or 19.04, subd. 6(3) of intent to seek an aggravated sentence, a hearing shall be held to determine whether the law and proffered evidence support an aggravated sentence. If so, the court shall determine whether the issues will be presented to the jury in a unitary or bifurcated trial.

In deciding whether to bifurcate the trial, the court shall consider whether the evidence in support of an aggravated sentence is otherwise admissible in the guilt phase of the trial and whether unfair prejudice would result to the defendant in a unitary trial. A bifurcated trial shall be ordered where evidence in support of an aggravated sentence includes evidence that is inadmissible during the guilt phase of the trial or would result in unfair prejudice to the defendant. If the court orders a unitary trial the court may still order separate final arguments on the issues of guilt and the aggravated sentence.

If the defendant intends to offer evidence of a victim's previous sexual conduct in a prosecution for violation of Minn. Stat. § 609.342 to 609.346, a motion shall be made pursuant to the procedures prescribed by Rule 412 of the Minnesota Rules of Evidence.

Comment—Rule 11

See comment following Rule 11.11.

Rule 11.05 Amendment of Complaint

The complaint may be amended as prescribed by these rules.

Comment—Rule 11

See comment following Rule 11.11.

Rule 11.06 Pleas

At the hearing the defendant may be permitted to plead to the offense charged in the complaint or to a lesser included offense, or an offense of lesser degree as permitted by Rule 15.

Comment—Rule 11

See comment following Rule 11.11.

Rule 11.07 Continuances; Determination of Issues

Upon motion of the prosecuting attorney or the defendant or upon the court's initiative, the court may continue the hearing or any part thereof from time to time as may be necessary for good cause related to the particular case. All issues presented at the Omnibus Hearing shall be determined within 30 days after the defendant's appearance under Rule 8 unless a later determination is required for good cause related to the particular case. When issues are determined, the court shall make appropriate findings in writing or orally on the record. The issues presented at the Omnibus Hearing shall be consolidated for hearing except as otherwise permitted by these rules.

Comment—Rule 11

See comment following Rule 11.11.

Rule 11.08 Record

Subd. 1. Recording. A verbatim record of the proceedings shall be made.

Subd. 2. Transcript. Upon timely application to the reporter, counsel for the defendant or for the prosecution shall be furnished with a transcript of the proceedings upon the following conditions:

(a) If the transcript is to be furnished to defense counsel, the costs thereof shall be prepaid except when the defendant is represented by the public defender or assigned counsel, or when the defendant makes a sufficient affidavit of inability to pay or secure the costs and the court orders that the defendant be supplied with the transcript at the expense of the appropriate governmental unit.

(b) The prosecution shall be furnished with the transcript without prepayment of costs.

(c) When a transcript is furnished to counsel, a copy shall be filed with the clerk of the court.

Subd. 3. Filing. The record and all papers and exhibits in the proceeding shall be filed or placed in the custody of the clerk of the court. Upon order of the court any exhibit may be returned to the party producing it.

Comment—Rule 11

See comment following Rule 11.11.

Rule 11.09 [Deleted.]

Rule 11.10 Plea; Trial Date

If the defendant is not discharged the defendant shall plead to the complaint or be given additional time within which to plead. If the defendant so requests, the court shall allow the defendant at the Omnibus Hearing to enter a plea, including a not guilty plea, even if the Omnibus Hearing is continued or Omnibus Hearing issues are still pending for decision by the court. The entry of a plea other than guilty in that situation does not waive any pending jurisdictional or other issues that the defendant may have raised for determination by the court at the Omnibus Hearing. If the defendant enters a plea other than guilty, a trial date shall then be set. A defendant shall be tried as soon as possible after entry of a plea other than guilty. On demand made in writing or orally on the record by the prosecuting attorney or the defendant, the trial shall be commenced within sixty (60) days from the date of the demand unless good cause is shown upon the prosecuting attorney's or the defendant's motion or upon the court's initiative why the defendant should not be brought to trial within that period. The time period shall not begin to run earlier than the date of the plea other than guilty. If trial is not commenced within 120 days after such demand is made and such a plea is entered, the defendant, except in exigent circumstances, shall be released subject to such nonmonetary release conditions as may be required by the court under Rule 6.01, subd. 1.

Comment—Rule 11

See comment following Rule 11.11.

Rule 11.11 Exclusion of Witnesses

Before or during any Omnibus or other pretrial hearing or proceeding, witnesses may be sequestered or excluded from the courtroom, prior to their appearance, in the discretion of the court.

Comment—Rule 11

If, following the filing of a complaint, a defendant does not plead guilty at the initial appearance before the district court under Rule 8, for felonies and gross misdemeanors, or at the first appearance under Rule 5 for gross misdemeanors, or if the defendant does not plead guilty at the arraignment under Rule 19.04, subd. 4, following an indictment, the Omnibus Hearing provided by Rule 11 shall be held. The initial appearance may be continued, and if the defendant does not then plead guilty, the Omnibus Hearing shall be held as provided by the rule.

The Omnibus Hearing provided by this rule is divided into three parts: (1) the Rasmussen hearing (Rule 11.02); (2) the hearing of pre-trial motions of the defendant and prosecution (Rule 11.04); (3) the hearing on other pre-trial issues brought up on the court's initiative (Rule 11.04). The hearings on any of these parts may be combined and heard simultaneously (Rule 11.07).

The current statutory hearing on probable cause has been replaced under these

rules by a motion to dismiss the complaint for lack of probable cause which is to be made in accordance with Rule 10 and heard at the Omnibus Hearing pursuant to Rule 11.03. If such a motion is made, the court shall base its probable cause determination upon the evidence set forth in Rule 18.06, subd. 1. In State v. Florence, 306 Minn. 442, 239 N.W.2d 892 (1976), the Supreme Court discussed the type of evidence that may be presented and considered on a motion to dismiss the complaint for lack of probable cause. Nothing in that case or in the rule prohibits a defendant from calling any witness to testify for the purpose of showing an absence of probable cause. In determining whether to dismiss a complaint under Rule 11.03 for lack of probable cause, the trial court is not simply reassessing whether or not probable cause existed to warrant the arrest. Rather, under Florence the trial court must determine based upon the facts disclosed by the record whether it is fair and reasonable to require the defendant to stand trial.

If, following the filing of a complaint, the defendant does not plead guilty upon the first appearance in the district court under Rule 5 for gross misdemeanors or upon the initial appearance in the district court under Rule 8 for felonies and gross misdemeanors or upon arraignment in the district court under Rule 19.04, subd. 4, following an indictment, the Omnibus Hearing (see ABA Standards, Discovery and Procedure Before Trial, 1.1, 5.1-5.3 (Approved Draft, 1970)) shall be held as provided by Rule 11 not later than twenty-eight (28) days after the initial appearance or seven days after the indictment arraignment, unless the period is extended for good cause related to the particular case (Rules 8.04; 19.04, subd. 4).

By that time, the prosecution will have given the Rasmussen and Spreigl notices (Rules 7.01; 7.02; 19.04, subd. 6(1) and (2)); the Rasmussen hearing will have been either waived or demanded (Rule 8.03); the discovery required without order of court will have been completed (Rules 7.04; 19.04, subd. 7; 9.01, subd. 1; 9.02, subd. 1); and pre-trial motions will have been served (Rules 10.04, subd. 1; 9.01, subd. 2; 9.02, subd. 2; 9.03, subd. 8; 18.02, subd. 2; 18.05, subds. 1 and 2; 17.03, subds. 3 and 4; 17.04; 17.06, subd. 3; 20.01, subd. 2; 20.03, subd. 1). (In the case of an indictment the pre-trial motions should include any motion to suppress based on the disclosures contained in the Rasmussen notice under Rule 19.04, subd. 6(1).)

The purpose of the Omnibus Hearing is to avoid a multiplicity of court appearances and hearings upon these issues with a duplication of evidence and to combine all of the issues that can be disposed of without trial into one appearance and hearing. (See ABA Standards, Discovery and Procedure Before Trial, 1.1, 5.3 (Approved Draft, 1970).) Early resolution of motions provides for more efficient handling of criminal cases at subsequent stages. This includes suppression motions, evidentiary motions, and nonevidentiary motions such as motions to disclose the identity of an informant or to consolidate or sever trials or co-defendants. Early resolution of these motions also helps to focus the lawyers' attention on a smaller number of witnesses, including law enforcement officers and victims of crimes. When such motions are resolved early, uncertainty with respect to many significant issues in a case are removed. This early resolution of motions also permits timely and meaningful pretrial dispositional conferences at which time the parties can engage in significant plea agreement discussions. Setting a firm trial date and commencing a trial on that date are also important factors in minimizing delays. Firm trial dates are most likely to be found in courts that achieve early resolution of pretrial motions. Achieving early resolution of pretrial motions requires the cooperation of the court, the local bar and law enforcement

agencies. When courts take early control of criminal cases with meaningful pretrial events it benefits all people within the criminal justice system and serves the efficient administration of justice.

If a Rasmussen hearing has been demanded under Rule 8.03 or other similar evidentiary issues presented by motion or otherwise (Rules 11.02, subd. 1; 11.03; 11.04), they should be combined for hearing if possible (Rule 11.07).

Rule 11.02 covers the Rasmussen hearing demanded under Rule 8.03 (or required by a motion to suppress in the case of an indictment). Upon the Rasmussen hearing under Rule 11.02 both parties may offer evidence and cross-examine the other's witnesses. The rule leaves to judicial interpretation the consequences of the defendant's testimony at a Rasmussen or similar evidentiary hearing, that is, whether it may be used against the defendant at trial substantively (See Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)) or by way of impeachment (cf. Harris v. New York, 401 U.S. 222, 91 S.Ct. 643, 28 L.Ed.2d 1 (1971)).

Rule 11.02, subd. 1 permits any party offering a videotape or audiotape exhibit to also provide to the court a transcript of the tape. This rule does not govern whether any such transcript is admissible as evidence in the case. That issue is governed by Article 10 of the Minnesota Rules of Evidence. However, upon an appeal of the proceedings, the transcript of the exhibit will be part of the record if the other party stipulates to the accuracy of the tape transcript as provided in Rule 28.02, subd. 9.

In State v. Scales, 518 N.W.2d 587 (Minn. 1994), the court held that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning must be electronically recorded in a place of detention and, if feasible, in any other place. Any "substantial" violation of this recording requirement requires suppression of any statements thereby obtained.

By Rule 11.03 the court shall also hear all motions made by the parties under Rule 10 (See also Rules 9.01, subd. 2; 9.02, subd. 2; 9.03, subd. 5; 9.03, subd. 8; 18.02, subd. 2; 18.05, subd. 1 and subd. 2; 17.03, subd. 3 and subd. 4; 17.04; 17.06; 17.06, subd. 3; 20.01, subd. 2; 20.03, subd. 1.) Motions not made upon grounds then known and available to the parties are waived, except lack of jurisdiction or failure of the complaint or indictment to state an offense, unless the court grants an exception to the waiver (Rule 10.03).

Rule 11.03 specifically permits a motion to dismiss a complaint for lack of probable cause, but does not permit a motion to dismiss an indictment upon this ground. See Rule 19.04, subd. 5.

The court shall also on its initiative under Rule 11.04 ascertain and hear any other issues that can be heard and disposed of before trial and any other matters that would promote a fair and expeditious trial. This would include requests or issues arising respecting discovery (Rule 9), evidentiary issues arising from the Spreigl notice (Rules 7.01, 19.04, subd. 6(2)), or other evidentiary issues, and expressly permits a pretrial dispositional conference if the court considers it necessary. (See F.R.Crim.P. 17.1.) Many judicial districts already make widespread and effective use of pretrial dispositional conferences to resolve cases at the earliest possible time. If such resolution is not possible, the conference may be used to determine the nature of the case so that

further hearings or trial may be scheduled as appropriate. The use of such dispositional conferences, is commendable and highly recommended by the Advisory Committee. To assure that the pretrial dispositional conference portion of the Omnibus Hearing is meaningful, trial courts should insist on timely discovery by the parties before the date of the Omnibus Hearing as required by Rule 9.01, subd. 1. The Advisory Committee also strongly commends the practice, now in effect in some counties, of preparing the Sentencing Guidelines Worksheet prior to the Omnibus Hearing. This may be done in connection with a pre-release investigation under Rule 6.02, subd. 3 and later may be included with any presentence investigation report required under Rule 27.03, subd. 1.

If the prosecuting attorney has given notice under Rule 7.03 or 19.04, subd. 6(3) of intent to seek an aggravated sentence, Rule 11.04 requires the court to have a hearing to determine any pretrial issues that need to be resolved in connection with that request. This could include issues as to the timeliness of the notice under Rule 7.03 or 19.04, subd. 6(3). The court must determine whether the proposed grounds legally support an aggravated sentence and whether or not the proffered evidence is sufficient to proceed to trial. The rule does not provide a standard for determining insufficiency of the evidence claims and that is left to case law development. If the aggravated sentence claim will be presented to a jury, the court must also decide whether the evidence will be presented in a unitary or a bifurcated trial and the rule provides the standards for making that determination. Even if a unitary trial is ordered for the presentation of evidence, the rule recognizes that presentation of argument on an aggravated sentence during the guilt phase of the proceedings may unduly prejudice a defendant. The rule therefore allows the court to order separate final arguments on the aggravated sentence issue, if necessary, after the jury renders its verdict on the issue of guilt.

By Rule 11.05 the complaint may be amended at the Omnibus Hearing as provided by Rule 17.05. (See also Rules 3.04, subd. 2; 17.06, subd. 4.)

One of the issues that should be determined at the Omnibus Hearing is the admissibility of the testimony, of any proposed witness who has been subjected to a hypnotic interview concerning the facts of the case. Ordinarily under State v. Mack, 292 N.W.2d 764 (Minn.1980) the testimony of a previously hypnotized witness concerning the subject matter adduced at a pretrial hypnotic interview may not be admitted in a criminal proceeding. Such testimony may be elicited only to the extent that it covers matters previously and unequivocally disclosed by the witness to the authorities before the hypnosis.

Under State v. Wenberg, 289 N.W.2d 503 (Minn.1980), if the prosecutor intends to impeach the defendant or any defense witness with evidence of prior convictions, the prosecutor must request a pretrial hearing on the admissibility of such evidence. If possible this issue should be heard at the Omnibus Hearing. See Rule 9.01, subd. 1(5) as to the reciprocal duties of the prosecutor and defense counsel to disclose the criminal records of the defendant and any defense witnesses. As to the standards for determining the admissibility of the impeachment evidence see Rule 609 of the Minnesota Rules of Evidence, State v. Jones, 271 N.W.2d 534 (Minn.1978), and State v. Brouillette, 286 N.W.2d 702 (Minn.1979).

If requested by motion under Rule 10, a hearing on the admissibility of evidence of additional offenses shall be held as part of the Omnibus Hearing. Before such evidence may be considered admissible it must be clear and convincing. Additionally,

according to State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967) such evidence is admissible only if the prosecution's case is otherwise weak. Because it may not be possible to determine the strength of the prosecution's case until trial, it may be necessary to continue final determination of this issue under Rule 11.07 until that time. The court, however, should determine at the Omnibus Hearing whether the evidence to be presented is clear and convincing. If it does not meet that standard or the other requirements of Rule 404(b) of the Minnesota Rules of Evidence then the court should determine before trial that the evidence is inadmissible. Unless a later determination is justified by good cause related to the particular case, Rule 11.07 requires that all issues presented to the court at the Omnibus Hearing must be decided within 30 days after the defendant's initial appearance before the court under Rule 8.

Under Rule 11.06 the defendant at the Omnibus Hearing may plead to the complaint or indictment or to a lesser or different offense as provided by Rules 14 and 15. See Rules 15.07 and 15.08 as to the standards and procedure for entering a plea to a lesser or a different offense.

By Rule 11.07 the Omnibus Hearing or any part thereof may be continued if necessary to dispose of the issues presented. At any dispositional conference portion of an Omnibus Hearing it is permissible under Rule 11.07 to continue the evidence suppression portion of the Omnibus Hearing until the day of trial if the court determines that resolution of the evidentiary issues would not dispose of the case. Such a continuance would be "for good cause related to the particular case" under Rule 11.07 and under that rule the court could enter an order continuing both the Omnibus Hearing and the court's decision on the evidentiary issues until the day of trial. Other grounds may also support such a continuance and as long as the court finds that the good cause is related to the particular case the continuance is justified under the rule. However, the court should not as a general rule or practice bifurcate the Omnibus Hearing or delay the hearing or any part of it until the day of trial when that is not justified by the circumstances of the particular case. To do so violates the purpose of these rules. See Rule 1.02 and the comments thereto. All issues presented at the Omnibus Hearing shall be determined within 30 days after the defendants initial appearance under Rule 8 unless a later determination is required for good cause related to the particular case. (See also Rule 10.04, subd. 2). See Minn. Stat. § 611A.033 regarding the prosecutor's duties under the Victim's Rights Act to make reasonable efforts to provide advance notice of any change in the schedule of court proceedings. This would include the Omnibus Hearing as well as trial or any other hearing.

Rule 11.07 requires appropriate findings upon the determinations made on the issues presented at the Omnibus Hearing in order that the basis for the determinations may clearly appear.

Rule 11.08, subd. 1, requires that a record of the Omnibus Hearing shall be made, and Rule 11.08, subd. 2 prescribes the circumstances in which a transcript may be furnished to the parties. The verbatim record required by Rule 11.08, subd. 1, may be made by a court reporter or recording equipment.

The intent of the Omnibus Hearing rules is that all issues that can be determined before trial shall be heard at the Omnibus Hearing and decided before trial. Consequently, when the Omnibus Hearing is held before a judge other than the trial judge, the trial judge, except in extraordinary circumstances will adhere to the findings and determinations of the Omnibus Hearing judge. See State v. Coe, 298 N.W.2d 770

(Minn.1980) and State v. Hamling, 314 N.W.2d 224 (Minn.1982), where this issue was discussed, but not decided.

A defendant who is not discharged following the Omnibus Hearing shall plead to the indictment or complaint in the district court or be given additional time within which to plead. If the defendant pleads not guilty, not guilty by reason of mental illness or mental deficiency, or double jeopardy or that prosecution is barred by Minn. Stat. § 609.035, a trial date shall be set. (Rule 11.10.) If the Omnibus Hearing or any part of it is continued pursuant to Rule 11.07, Rule 11.10 further provides that the defendant may enter a plea including a not guilty plea at the first Omnibus Hearing appearance. This assures that if a defendant wishes to demand a speedy trial under Rule 11.10, the running of the time limit for that will not be delayed by continuing the plea until the continued Omnibus Hearing. If the trial date is continued, see Minn. Stat. § 611A.033 regarding the prosecuting attorney's duties under the Victim's Rights Act to make reasonable efforts to provide advance notice of the continuance.

Rule 11.10 provides that a defendant shall be brought to trial within 60 days after demand therefor is made by the prosecuting attorney or defendant, unless good cause is shown for a delay, but regardless of a demand, the defendant shall be tried as soon as possible. (Rule 11.10 supersedes Minn. Stat. § 611.04 (1971) requiring the defendant to be brought to trial at the next term of court.) See Minn. Stat. § 611A.033 regarding the prosecutor's duties under the Victim's Rights Act in relation to speedy trial demands.

For good cause the trial may be postponed beyond the 60-day time limit upon request of the prosecuting attorney or the defendant or upon the court's initiative. Good cause for the delay does not include court calendar congestion unless exceptional circumstances exist. See McIntosh v. Davis, 441 N.W.2d 115 (Minn.1989). Even if good cause exists for postponing the trial beyond the 60-day time limit, the defendant, except in exigent circumstances, must be released, subject to such nonmonetary release conditions as may be required by the court under Rule 6.02, subd. 1, if trial has not yet commenced within 120 days after the demand is made and the not guilty plea entered. Other sanctions for violation of these speedy trial provisions are left to case law. See State v. Kasper, 411 N.W.2d 182 (Minn.1987) and State v. Friberg, 435 N.W.2d 509 (Minn.1989).

Rule 11.10 does not attempt to set arbitrary time limits (other than those resulting from the demand), because they would have to be circumscribed by numerous specific exclusions (See ABA Standards, Speedy Trial, 2.3 (Approved Draft, 1968)) which are covered in any event by the more general terms of the rule. (See ABA Standards, Speedy Trial, 2.3(h) (Approved Draft, 1968).)

Rule 11.10 does not specify the consequences of a failure to bring the defendant to trial within the time limits set by the rule. (This differs from ABA Standards, Speedy Trial, 4.1, Pre-Trial Release, 5.10 (Approved Drafts, 1968) in which the consequences are set forth.)

The consequences and the time limits beyond which a defendant is considered to have been denied the constitutional right to a speedy trial are left to judicial decision. (See Barker v. Wingo, 407 U.S. 514 (1972).) The constitutional right to a speedy trial is triggered not when the plea is entered but when a charge is issued or an arrest is made. State v. Jones, 391 N.W.2d 224 (Minn. 1986). The existence or absence of the demand

under Rule 11.10 provides a factor that may be taken into account in determining whether the defendant has been unconstitutionally denied a speedy trial. (See Barker v. Wingo, supra.)

Under Rule 11.10 the time period following the demand does not begin to run earlier than the date of the plea of not guilty, not guilty be reason of mental illness or mental deficiency, or double jeopardy or that prosecution is barred by Minn. Stat. § 609.035. However, under Rule 11.10, the defendant may insist on the right to enter such a plea at the first Omnibus Hearing appearance even if the hearing is continued. This will assure that a defendant can get the speedy trial time limit running even if some Omnibus Hearing issues are continued for later decision by the court. The plea other than guilty was selected as the crucial date because the defendant is not required to so plead until at or after the Omnibus Hearing (Rules 8.03; 11.06; 11.10) and by that time all discovery and pre-trial proceedings will have been substantially completed. If demand is made before such plea, the 60-day period starts to run upon entry of the plea. It is contemplated that when the pre-trial proceedings have been completed, the court will require the defendant to enter a plea, if the defendant has not already done so, in order that the defendant cannot delay the trial by intentionally delaying the plea. (Rule 11).

Rule 12. Pretrial Conference and Evidentiary Hearing in Misdemeanor Cases

Rule 12.01 Pretrial Conference

A pretrial conference may be held in such cases and at such time as the court orders to consider the motions and other issues referred to in Rules 12.02 and 12.03. Such motions and other issues shall be heard immediately prior to trial whenever there has been no pretrial conference or whenever the court has so ordered for the purpose of hearing witnesses or for other good cause.

Comment—Rule 12

See comment following Rule 12.08.

Rule 12.02 Motions

The court shall hear and determine all motions made by the defendant or prosecution and receive such evidence as may be offered in support or opposition. The defendant may offer evidence in defense, and the defendant and prosecution may cross-examine the other's witnesses.

Comment—Rule 12

See comment following Rule 12.08.

Rule 12.03 Other Issues

The court shall ascertain any other constitutional, evidentiary, procedural or other issues that may be heard or disposed of before trial and such other matters as will promote a fair and expeditious trial, and shall hear and determine them, or continue the hearing for that purpose.

If the prosecution has given notice under Rule 7.02 of intention to offer evidence of additional offenses, upon motion a hearing shall be held to determine their admissibility under Rule 404(b) of the Minnesota Rules of Evidence and whether there is clear and convincing evidence that defendant committed the offenses.

Comment—Rule 12

See comment following Rule 12.08.

Rule 12.04 Hearing on Evidentiary Issues

Subd. 1. Evidence. If the defendant or the prosecution has demanded a hearing on the issue specified by Rule 7.01, the court shall hear and determine the issue upon such evidence as may be offered by the prosecutor or the defense. If either party offers into evidence a videotape or audiotape exhibit, that party may also provide to the court a transcript of the proposed exhibit which will be made a part of the record.

Subd. 2. Cross-Examination. Upon such hearing, the defendant and the prosecution may cross-examine the other's witnesses as to the evidentiary and identification issues raised as specified in Rule 7.01.

Subd. 3. Time. Any evidentiary hearing shall be held separately from the trial when the trial is to be before a jury and in the discretion of the court may be held either separately or as part of the trial when the trial is to the court. Any separate hearing shall be held immediately prior to trial unless the court for good cause otherwise orders.

Comment—Rule 12

See comment following Rule 12.08.

Rule 12.05 Amendment of Complaint

The complaint, if any, may be amended at the pretrial conference as prescribed by these rules.

Comment—Rule 12

See comment following Rule 12.08.

Rule 12.06 Pleas

At the pretrial conference the defendant may be permitted to withdraw any prior plea and to enter a plea of guilty to the offense charged or such other different offense as permitted in Rule 15.08.

Comment—Rule 12

See comment following Rule 12.08.

Rule 12.07 Continuances; Determination of Issues

The court may continue the pretrial conference as necessary and for the purpose of taking testimony or other good cause, and may continue the determination of any issues or motions until the day of trial. All motions and issues including those raised at the evidentiary hearing shall be determined before trial begins unless otherwise agreed to by the prosecution and the defense. When the motions and issues are determined, the court shall make appropriate findings in writing or orally on the record.

Comment—Rule 12

See comment following Rule 12.08.

Rule 12.08 Record

Subd. 1. Record. Unless waived by counsel, a verbatim record of the proceedings at the evidentiary hearing shall be made.

Subd. 2. Transcript and Filing. Transcript and filing shall be governed by the provisions of Rule 11.08, subd. 2 and subd. 3.

Comment—Rule 12

There will be no Omnibus Hearing required for misdemeanors (see Rule 11). There is no necessity for a probable cause determination for misdemeanors. A Rasmussen hearing usually can be conducted on the same day as the trial.

The multiplicity of court appearances and hearings which prompted the establishment of an Omnibus Hearing for felonies and gross misdemeanors (see the comments to Rule 11) is not a problem in misdemeanor cases. Thus, no Omnibus Hearing is necessary. Rather, this rule prescribes that a pre-trial conference may be held in such cases and at such times as the court may order and any Rasmussen hearing will ordinarily be conducted immediately prior to trial.

Trial courts are encouraged to hold pretrial conferences, especially in jury cases. Since a jury trial would normally last a day or longer, requiring the investment of time and expense, a pretrial conference which may settle the case without a trial, appears justified. If a pretrial conference is scheduled, it should be held at such times as the court orders and ordinarily the courts should order it held before the day of trial so that witnesses and jurors will be spared the inconvenience of appearing for trial in a case that is settled. At the conference the court will consider the same matters upon which an Omnibus Hearing must be held in felony and gross misdemeanor cases (see Rule 11). Under Rule 12.02 the court should hear and determine all motions made under Rule 10 (see also Rules 7.03; 17.03, subds. 3 and 4; 17.04; 17.06; 17.06, subd. 3; and 17) by the prosecutor or the defendant and receive any evidence subject to cross-examination by the other party, unless the court grants an exception to the waiver (Rule 10.03). Motions that are not made upon grounds then known and available to the parties are waived, with the exception of those for lack of jurisdiction over the offense or failure of the complaint to state an offense. At the conference the court on its initiative under Rule 12.03 shall also ascertain and hear any other issues that can be heard and disposed of before trial. This would include requests or issues arising from the Spreigl notice (Rule 7.02), and any other matters which would promote a fair and expeditious trial. If no pretrial conference

is held, any motions and issues under Rules 12.02 and 12.03 which arise should be heard (Rule 12.01) and determined (Rule 12.07) immediately prior to trial.

Under State v. Wenberg, 289 N.W.2d 503 (Minn.1980), if the prosecutor intends to impeach the defendant or any defense witness with evidence of prior convictions, the prosecutor must request a pretrial hearing on the admissibility of such evidence. See Rule 609 of the Minnesota Rules of Evidence, State v. Jones, 271 N.W.2d 534 (Minn.1978), and State v. Brouillette, 286 N.W.2d 702 (Minn.1979) as to the standards for determining the admissibility of such impeachment evidence.

If requested by motion under Rule 10, a hearing on the admissibility of evidence of additional offenses shall be held pursuant to Rule 12.03. Before such evidence may be considered admissible it must be clear and convincing. Additionally, according to State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967) such evidence is admissible only if the prosecution's case is otherwise weak. Because it may not be possible to determine the strength of the prosecution's case until trial, it may be necessary to continue final determination of this issue under Rule 12.07 until that time. The court, however, should determine before trial whether the evidence to be presented is clear and convincing. If it does not meet that standard or the other requirements of Rule 404(b) of the Minnesota Rules of Evidence then the court should determine before trial that the evidence is inadmissible. Unless it is not possible to do so, Rule 12.07 requires that all issues presented to the court under Rule 12 must be decided before trial.

Either at or before a pretrial conference, or at least seven days before trial if no conference is held, the prosecutor must serve the Rasmussen and Spreigl notice (Rules 7.01 and 7.02). Any other pretrial motions should be served at least three days before the conference or at least three days before trial if no conference is held (Rules 7.03; 10.04, subd. 1; 17.03, subds. 3 and 4; 17.04; 17.06; 17.06, subd. 3; and 17).

Rule 12.04 covers the Rasmussen hearing demanded under Rule 5.04, subd. 4. Under Rule 12.04, subd. 3 any Rasmussen hearing would be held separately from any jury trial, but may be held either separately or as part of the trial when trial is to the court. Any separate hearing should be held immediately prior to trial unless the court for good cause orders that it be held at a different time. This procedure continues substantially the present practice under City of St. Paul v. Page, 285 Minn. 374, 173 N.W.2d 460 (1969).

At the Rasmussen hearing, both parties may offer evidence (Rule 12.04, subd. 2) and cross-examine the other's witnesses (Rule 12.04, subd. 3). The rule leaves to judicial interpretation the consequences of the defendant's testimony at a Rasmussen or similar evidentiary hearing as to whether it can be used against the defendant at trial substantively (see Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968)) or by way of impeachment (cf. Harris v. New York, 401 U.S. 222 (1971)).

Rule 12.04, subd. 1 permits any party offering a videotape or audiotape exhibit to also provide to the court a transcript of the tape. This rule does not govern whether any such transcript is admissible as evidence in the case. That issue is governed by Article 10 of the Minnesota Rules of Evidence. However, upon an appeal of the proceedings, the transcript of the exhibit will be part of the record if the other party stipulated to the accuracy of the tape transcript as provided in Rule 28.02, subd. 9.

By Rule 12.05 the complaint may be amended at the pre-trial conference as provided by Rule 17.05 (see also Rules 3.04, subd. 2 and 17.06, subd. 4).

By Rule 12.06 the defendant at the pretrial conference may plead to the complaint or tab charge or to such other different offense as is permitted by Rule 15.08.

Rule 12.07 provides for the continuation of the pretrial conference if necessary to dispose of the issues presented. For the purpose of taking testimony or other good cause the court may continue the determination of issues or motions until the day of trial. Such a continuance, where testimony is required, will save witnesses an additional court appearance where those witnesses would be testifying at trial. Where no pretrial conference is held, any motions raised by the parties shall be heard on the day of the trial (Rule 10.04, subd. 2). All motions and issues including those raised at a separate evidentiary hearing shall be determined before trial begins unless otherwise agreed to by the prosecution and the defense. Findings may be made either in writing or orally on the record.

Rule 12.08, subd. 1 requires that a verbatim record of the evidentiary hearing be made by a court reporter, or recording equipment. Rule 12.08, subd. 2 prescribes the circumstances in which a transcript may be furnished to the parties. The record and all papers shall be filed with the clerk of the court in which the proceedings took place (Rule 12.08, subd. 2).

Rule 13. Arraignment in Felony and Gross Misdemeanor Cases

The arraignment shall be conducted as follows:

Rule 13.01 In Open Court

The arraignment shall be conducted in open court.

Rule 13.02 Right to Counsel

If the defendant other than a corporation appears without counsel, the court shall advise the defendant of the right to counsel, and when required, shall appoint counsel pursuant to Rule 5.02.

Rule 13.03 Copy and Reading of Charges

The defendant shall be provided with a copy of the complaint or indictment if it has not been previously provided. The complaint or indictment shall be read to the defendant unless the reading is waived. For designated gross misdemeanors as defined by Rule 1.04(b) prosecuted by tab charge pursuant to Rule 4.02, subd. 5(3), the tab charge shall be read to the defendant.

Rule 13.04 Plea

The defendant shall be called on to plead or may be given time to plead.

Rule 13.05 Record

A verbatim record of the arraignment shall be made.

Comment—Rule 13

Arraignment as provided by Rule 13 will take place at the appearance of the defendant in the court under Rule 8 following a complaint charging a felony or gross misdemeanor or following entry of a tab charge for a designated gross misdemeanor as defined by Rule 1.04(b) or under Rule 19.04, subd. 4 and subd. 5 following an indictment. At that time the defendant may enter only a guilty plea. If the defendant does not wish to plead guilty, no other plea is to be entered then and the arraignment is continued until the Omnibus Hearing when pursuant to Rule 11.10 the defendant shall plead or be given additional time within which to plead. In the case of a complaint charging a felony or gross misdemeanor, the arraignment in the court under Rule 8.01 shall be held within 14 days after the defendant's initial appearance before a court (Rule 5.03), under Rule 5, and in the case of an indictment, within 7 days after the defendant's first appearance in the district court (Rule 19.04, subd. 1 and subd. 4). Of course the appearances under Rule 5 and Rule 8 could be consolidated pursuant to Rule 5.03 and the arraignment on the complaint or tab charge would then be held at that consolidated appearance.

The requirement of Rule 13.01 that the arraignment shall be conducted in open court is taken from F.R.Crim.P. 10 and follows present Minnesota practice (Minn. Stat. § 630.01 (1971)).

Rule 13.02 providing that the court shall advise the defendant of the right to counsel continues the requirements of Minn. Stat. §§ 611.15, 630.10 (1971).

If the defendant has the right to counsel (See ABA Standards, Providing Defense Services, 4.1 (Approved Draft, 1968); State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967)), appears without counsel, and is financially unable to afford counsel, Rule 13.02 requires the court to appoint counsel unless the defendant knowingly and voluntarily waives the right (ABA Standards, Providing Defense Services, 7.1, 7.2 (Approved Draft, 1968)). The waiver shall be in writing (Minn. Stat. § 611.19 (1971); ABA Standards, Providing Defense Services, 7.3 (Approved Draft, 1968)) or under Rule 13.02 may be made orally before the court on the record.

Rule 13.03 requiring that the defendant be provided with a copy of the indictment or complaint and that the indictment or complaint be read to the defendant unless waived continues the practice under Minn. Stat. § 630.11 (1971).

Under Rule 13.04, the defendant shall be called on to plead (See F.R.Crim.P. 10), or shall be given such time as the court determines within which to plead. This follows present Minnesota practice (Minn. Stat. § 630.13 (1971)). If the defendant does not plead guilty, Rules 8.04 and 19.04, subd. 5 provide that an Omnibus Hearing under Rule 11 shall be scheduled within 28 days and 7 days respectively, and the defendant will not be required or permitted to plead earlier than that date.

By Rule 11.10, if the defendant is not discharged following the Omnibus Hearing, the defendant shall plead to the complaint or, when authorized, the tab charge promptly or may be given additional time.

When the defendant pleads not guilty, a trial date shall be set (See Rule 11.10).

When the defendant pleads guilty, the procedure prescribed by Rule 15 shall be followed.

Rule 14. Pleas

Rule 14.01 Pleas Permitted

A defendant may plead as follows:

(a) Guilty.

(b) Not guilty.

(c) Not guilty by reason of mental illness or mental deficiency.

(d) Double jeopardy or that prosecution is barred by Minn. Stat. § 609.035 (1971), either of which may be pleaded with or without the plea of not guilty.

Comment—Rule 14

See comment following Rule 14.03.

Rule 14.02 Who May Plead

Subd. 1. By an Individual in Felony and Gross Misdemeanor Cases. A plea to an indictment or complaint or, for a designated gross misdemeanor as defined by Rule 1.04(b), a tab charge by an individual defendant shall be made orally on the record by the defendant in person.

Subd. 2. By an Individual in Misdemeanor Cases. A plea to a complaint or tab charge by an individual defendant shall be made orally on the record or by the petition to plead guilty provided for in Rule 15.03, subd. 2. If the court is satisfied that the defendant has knowingly and voluntarily waived the right to be present, the plea may be entered by counsel.

Subd. 3. By a Corporation. A plea by a corporate defendant shall be made by counsel or a corporate officer, and shall be made orally on the record or in writing.

Subd. 4. Defendant's Refusal to Plead. If the defendant stands mute or refuses to plead, or if the court refuses to accept a plea of guilty, the court shall proceed as if the defendant had entered a plea of not guilty.

If a defendant corporation fails to appear, the court upon proof of the commission of the offense charged may enter judgment of conviction and impose such sentence as may be appropriate.

Comment—Rule 14

See comment following Rule 14.03.

Rule 14.03 Time of Plea

At any time during the proceedings, except as provided by Rule 8.01, a defendant may appear before the court to enter a plea of guilty to the offense charged or to some other offense pursuant to a plea agreement reached under Rule 15.04. To schedule such an appearance, the defendant shall file a written request with the clerk of court indicating the offense to which the defendant wishes to plead guilty. Upon receiving such a request, the clerk shall schedule an appearance before the court at the earliest available date, which date, in any event, shall be not later than fourteen days after the filing of the request. The clerk shall then notify the defendant and the prosecuting attorney of the time and place of such court appearance.

Comment—Rule 14

Rule 14 adopts the pleas provided by Minn. Stat. § 630.28 (1971), and adds the plea of not guilty by reason of mental illness or mental deficiency as defined by Minn. Stat. § 611.026 (1971) with its judicial interpretations, and the plea of the bar provided by Minn. Stat. § 609.035 (1971). Notice of a defense or defenses under Rule 9.02, subd. 1(3)(a) does not obviate the necessity for a plea under Rule 14.

Rule 20.02, subd. 6(2) and (5), governing the procedure upon the defense of mental illness or mental deficiency, contemplate that a defendant shall plead both not guilty and not guilty by reason of mental illness or mental deficiency when intending to put in issue both guilt of the elements of the offense charged and mental responsibility by reason of mental illness or mental deficiency.

A conditional plea of guilty may not be entered whereby the defendant reserves the right to appeal the denial of a motion to suppress evidence or any other pretrial order. State v. Lothenbach, 296 N.W.2d 865 (Minn. 1980). One option, as authorized by Rule 26.01 subd. 3, is to plead not guilty, stipulate the facts, waive the jury trial, and, if there is a finding of guilty, appeal the judgment of conviction. Id. A guilty plea also waives any appellate challenge to an order certifying the defendant as an adult. Waynewood v. State, 552 N.W.2d 718 (Minn. 1996).

Rule 14.02, subd. 1 continues the requirement of Minn. Stat. § 630.28 (1971) that the plea shall be made orally on the record.

Rule 14.02, subd. 2, unlike Minn. Stat. § 630.29, permits a plea of guilty or not guilty to a misdemeanor to be made by counsel, with the permission of the court. Otherwise, the plea shall be made in person except in the case of a corporation. In misdemeanor cases, by Rule 14.02, subd. 2, before accepting such a plea through counsel, the court should determine whether counsel has advised the defendant of the rights and information contained in Rule 15.02, and whether the plea would be acceptable under Rule 15 if the defendant were present personally in court. The petition to plead guilty provided for in Rule 15.03, subd. 2 and in the Appendix B to Rule 15, if properly completed and filed with the court, constitutes a proper plea. The defendant need not be present when it is filed and accepted. See also Rule 26.03, subd. 1(3) (defendant's presence at trial and sentencing) and Rule 27.03, subd. 2 (defendant's presence at sentencing). If the court is satisfied that the defendant has knowingly and

voluntarily decided to enter the plea and to waive the right to be present in court, then the court must allow the plea to be entered in the defendant's absence.

By Rule 14.02, subd. 3, a plea by a corporation may be made orally or in writing by counsel or a corporate officer. (See Minn. Stat. § 630.16 (1971).)

Rule 14.02, subd. 3 provides for the procedure when a corporation fails to appear in response to a summons or an order of court or otherwise. (This changes Minn. Stat. § 630.16 (1971).)

Rule 14.02, subd. 4 governing the procedure when a defendant refuses to plead or when the court refuses to accept a plea of guilty follows the substance of Minn. Stat. § 630.34 (1971). The court should not refuse to accept a plea merely because the defendant is not present. The procedure upon a plea of guilty is set forth in Rule 15.

Rule 15. Procedure Upon Plea of Guilty; Plea Agreements; Plea Withdrawal; Plea to Lesser Offense; Aggravated Sentence

Rule 15.01 Acceptance of Plea; Questioning Defendant on Plea or Aggravated Sentence; Felony and Gross Misdemeanor Cases

Subdivision 1. Guilty Plea.

Before the court accepts a plea of guilty, the defendant shall be sworn and questioned by the court with the assistance of counsel as to the following:

1. Name, age and date and place of birth and whether the defendant is handicapped in communication and, if so, whether a qualified interpreter has been provided for the defendant.

2. Whether the defendant understands the crime charged.

3. Specifically, whether the defendant understands that the crime charged is (name of offense) committed on or about (month) (day) (year) in _____ County, Minnesota (and that the defendant is tendering a plea of guilty to the crime of (name of offense) which is a lesser degree or lesser included offense of the crime charged).

4. a. Whether the defendant has had sufficient time to discuss the case with defense counsel.

b. Whether the defendant is satisfied that defense counsel is fully informed as to the facts of the case, and that defense counsel has represented the defendant's interests and fully advised the defendant.

5. Whether the defendant has been told by defense counsel and understands that upon a plea of not guilty, there is a right to a trial by jury and that a finding of guilty is not possible unless all jurors agree.

6. a. Whether the defendant has been told by defense counsel and understands that there will not be a trial by either a jury or by a judge without a jury if the defendant pleads guilty.

b. Whether the defendant waives the right to a trial by a jury or a judge on the issue of guilt.

7. Whether the defendant has been told by defense counsel, and understands that if the defendant wishes to plead not guilty and have a trial by jury or by a judge, the defendant will be presumed to be innocent until guilt is proved beyond a reasonable doubt.

8. a. Whether the defendant has been told by defense counsel, and understands that if the defendant wishes to plead not guilty and have a trial, the prosecutor will be required to have the prosecution witnesses testify in open court in the defendant's presence, and that the defendant will have the right, through defense counsel, to question these witnesses.

b. Whether the defendant waives the right to have these witnesses testify in the defendant's presence in court and be questioned by defense counsel.

9. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to plead not guilty and have a trial, the defendant will be entitled to require any defense witnesses to appear and testify.

b. Whether the defendant waives this right.

10. Whether defense counsel has told the defendant and the defendant understands:

a. That the maximum penalty that the court could impose for the crime charged (taking into consideration any prior conviction or convictions) is imprisonment for _____ years.

b. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than _____ months for the crime charged.

c. that for felony driving while impaired offenses and most sex offenses, a mandatory period of conditional release will be imposed to follow any executed prison sentence, and violating the terms of that conditional release may increase the time the defendant serves in prison.

d. That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

e. That the prosecutor is seeking an aggravated sentence.

11. Whether defense counsel has told the defendant that the defendant discussed the case with one of the prosecuting attorneys, and that the respective attorneys agreed that if the defendant entered a plea of guilty the prosecutor will do the following: (state the substance of the plea agreement.)

12. Whether defense counsel has told the defendant and the defendant

understands that if the court does not approve the plea agreement, the defendant has an absolute right to withdraw the plea of guilty and have a trial.

13. Whether, except for the plea agreement, any policeman, prosecutor, judge, defense counsel, or any other person, made any promises or threats to the defendant or any member of the defendant's family, or any of the defendant's friends, or other persons in order to obtain a plea of guilty.

14. Whether defense counsel has told the defendant and the defendant understands that if the plea of guilty is for any reason not accepted by the court, or is withdrawn by the defendant with the court's approval, or is withdrawn by court order on appeal or other review, that the defendant will stand trial on the original charge (charges) namely, (state the offense) (which would include any charges that were dismissed as a result of the plea agreement) and that the prosecution could proceed just as if there had never been any agreement.

15. a. Whether the defendant has been told by defense counsel and understands, that if the defendant wishes to plead not guilty and have a jury trial, the defendant can testify if the defendant wishes, but that if the defendant decided not to testify, neither the prosecutor nor the judge could comment to the jury about the failure to testify.

b. Whether the defendant waives this right, and agrees to tell the court about the facts of the crime.

16. Whether with knowledge and understanding of these rights the defendant still wishes to enter a plea of guilty or instead wishes to plead not guilty.

17. Whether the defendant makes any claim of innocence.

18. Whether the defendant is under the influence of intoxicating liquor or drugs or under mental disability or under medical or psychiatric treatment.

19. Whether the defendant has any questions to ask or anything to say before stating the facts of the crime.

20. What is the factual basis for the plea.

(NOTE: It is desirable that the defendant also be asked to acknowledge signing the Petition to Plead Guilty, suggested form of which is contained in Appendix A to these rules; that the defendant has read the questions set forth in the petition or that they have been read to the defendant, and that the defendant understands them; that the defendant gave the answers set forth in the petition; and that they are true. If an aggravated sentence is sought, refer to subdivision 2 of this rule.)

Subd. 2. Aggravated Sentence.

Before the court accepts an admission of facts in support of an aggravated sentence, the defendant shall be sworn and questioned by the court with the assistance of counsel, in addition to and separately from the inquiry that may be required by subdivision 1, as to the following:

1. Whether the defendant understands that the prosecution is seeking a sentence greater than the presumptive sentence called for in the sentencing guidelines.

2. a. Whether the defendant understands that the presumptive sentence for the crime to which the defendant has pled guilty or otherwise has been found guilty is _____, and that the defendant could not be given an aggravated sentence greater than the presumptive sentence unless the prosecutor proves facts in support of such aggravated sentence.

b. Whether the defendant understands that the sentence in this case will be an aggravated sentence of _____, or will be left to the judge to decide.

3. a. Whether the defendant has had sufficient time to discuss this aggravated sentence with defense counsel.

b. Whether the defendant is satisfied that defense counsel is fully informed as to the facts supporting an aggravated sentence and has represented defendant's interests and fully advised the defendant.

4. Whether the defendant has been told by defense counsel and understands that even though the defendant has pled guilty to or has otherwise been found guilty of the crime of _____, defendant may nonetheless deny the facts alleged by the prosecution which would support an aggravated sentence

5. a. Whether the defendant has been told by defense counsel and understands that if defendant chooses to deny the facts alleged in support of an aggravated sentence, the defendant has a right to a trial by either a jury or a judge to determine whether those facts have been proven, and that a finding that the facts are proven is not possible unless all jurors agree.

b. Whether the defendant waives the right to a trial by a jury or a judge of the facts in support of an aggravated sentence.

6. Whether the defendant has been told by defense counsel and understands that at such trial before a jury or a judge, the defendant would be presumed not to be subject to an aggravated sentence and the court could not impose an aggravated sentence unless the facts in support of the aggravated sentence are proven beyond a reasonable doubt.

7. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts alleged in support of an aggravated sentence and have a trial by a jury or a judge, the prosecutor will be required to have the prosecution witnesses testify in open court in the defendant's presence, and that the defendant will have the right, through defense counsel, to question these witnesses.

b. Whether the defendant waives the right to have these witnesses testify in the defendant's presence and be questioned by defense counsel.

8. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts alleged in support of an aggravated sentence and have a trial by a jury or a judge, the defendant will be entitled to require any defense witnesses to appear and testify.

b. Whether the defendant waives this right.

9. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts in support of an aggravated sentence and have a trial by a jury or a judge, the defendant can testify if the defendant wishes, but that if the defendant decides not to testify, neither the prosecutor nor the judge could comment to the jury about the failure to testify.

b. Whether the defendant waives this right and agrees to tell the court about the facts in support of an aggravated sentence.

10. Whether, with knowledge and understanding of these rights, the defendant still wishes to admit the facts in support of an aggravated sentence or instead wishes to deny these facts and have a trial by a jury or a judge.

11. What is the factual basis for an aggravated sentence.

(Note: Where a represented defendant is pleading guilty without an aggravated sentence, use the plea petition form in Appendix A to these rules. Where a represented defendant's plea agreement includes an admission to facts to support an aggravated sentence, use both Appendix A and Appendix E.

Where an unrepresented defendant is pleading guilty without an aggravated sentence, use Appendix C to these rules. Where an unrepresented defendant's plea agreement includes an admission to facts to support an aggravated sentence, use both Appendix C and Appendix F.)

Comment—Rule 15

See comment following Rule 15.11.

Rule 15.02 Acceptance of Plea; Questioning Defendant; Misdemeanor Cases

Before the court accepts a plea of guilty to any offense punishable upon conviction by incarceration, any plea agreement shall be explained in open court. The defendant shall then be questioned by the court or counsel in substance as follows:

1. Specifically whether the defendant understands that the crime charged is (name the offense) committed on or about (Month) (Day) (Year) in _____ County, Minnesota (and that the defendant is pleading guilty to the crime of (name of offense)).

2. Whether the defendant realizes that the maximum possible sentence is 90 days imprisonment and a fine in the amount allowed by applicable law. (Under the applicable law, if the maximum sentence is less, it should be so stated.) Further, whether the defendant realizes that, if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

3. Whether the defendant knows there is a right to the assistance of counsel at every stage of the proceedings and that counsel will be appointed for a defendant unable to afford counsel.

4. Whether the defendant knows of the right:

(a) to trial by the court or a jury and that a finding of guilty is not possible in a jury trial unless all jurors agree;
(b) to confront and cross-examine all prosecution witnesses;
(c) to subpoena and present defense witnesses;
(d) to testify or remain silent at trial or at any other time;
(e) to be presumed innocent and that the State must prove its case beyond a reasonable doubt; and
(f) to a pretrial hearing to contest the admissibility at trial of any confessions or admissions or of any evidence obtained from a search and seizure.

5. Whether the defendant waives these rights.

6. Whether the defendant understands the nature of the offense charged.

7. Whether the defendant believes that what the defendant did constitutes the offense to which the defendant is pleading guilty.

The court with the assistance of counsel, if any, shall then elicit sufficient facts from the defendant to determine whether there is a factual basis for all elements of the offense to which the defendant is pleading guilty.

Where the guilty plea is being entered at the defendant's first appearance in court, the statement as to the defendant's rights required by Rule 5.01 may be combined with the questioning required above prior to entry of a guilty plea.

Comment—Rule 15

See comment following Rule 15.11.

Rule 15.03 Alternative Methods in Misdemeanor Cases

Subd. 1. Group Warnings. The court may advise a number of defendants at once as to the consequences of a plea and as to their constitutional rights as specified in questions 2, 3 and 4 above. Before such a procedure is followed the court shall first determine whether any defendant is handicapped in communication. If so, the court must provide the services of a qualified interpreter to any such defendant and should provide the warnings contemplated by this rule to any such defendant individually. The court's statement in a group warning shall be recorded and each defendant when called before the court shall be asked whether the defendant heard and understood the statement. The defendant shall then be questioned on the record as to the remaining matters specified in Rule 15.02.

Subd. 2. Petition to Plead Guilty. The defendant or defense counsel may file with the court a petition to plead guilty as provided for in the Appendix B to Rule 15 signed by the defendant indicating that the defendant is pleading guilty to the specified misdemeanor offense with the understanding and knowledge required of defendants personally entering a guilty plea under Rule 15.02.

Comment—Rule 15

See comment following Rule 15.11.

Rule 15.04 Plea Discussion and Plea Agreements

Subd. 1. Propriety of Plea Discussions and Plea Agreements. In cases in which it appears that it would serve the interest of the public in the effective administration of criminal justice under the principles set forth in Rule 15.04, subd. 3(2), the prosecuting attorney may engage in plea discussions for the purpose of reaching a plea agreement. The prosecuting attorney shall engage in plea discussions and reach a plea agreement with the defendant only through defense counsel.

Subd. 2. Relationship Between Defense Counsel and Defendant. Defense counsel shall conclude a plea agreement only with the consent of the defendant and shall ensure that the decision to enter a plea of guilty is ultimately made by the defendant.

Subd. 3. Responsibilities of the Trial Court Judge.

(1) Disclosure of Plea Agreement. If a plea agreement has been reached which contemplates entry of a plea of guilty, the trial court judge may permit the disclosure of the agreement and the reasons therefor in advance of the time for tender of the plea. When such plea is tendered and the defendant questioned, the trial court judge shall reject or accept the plea of guilty on the terms of the plea agreement. The court may postpone its acceptance or rejection until it has received the results of a pre-sentence investigation. If the court rejects the plea agreement, it shall so advise the parties in open court and then call upon the defendant to either affirm or withdraw the plea.

(2) Consideration of Plea in Final Disposition. The court may accept a plea agreement of the parties when the interest of the public in the effective administration of justice would thereby be served. Among the considerations which are appropriate in determining whether such acceptance should be given are:

(a) That the defendant by pleading guilty has aided in ensuring the prompt and certain application of correctional measures;

(b) That the defendant has acknowledged guilt and shown a willingness to assume responsibility for the criminal conduct;

(c) That the concessions will make possible the application of alternative correctional measures which are better adapted to achieving rehabilitative, protective, deterrent or other purposes of correctional treatment, or will prevent undue harm to the defendant;

(d) That the defendant has made trial unnecessary when there are good reasons for not having a trial;

(e) That the defendant has given or offered cooperation which has resulted or may result in the successful prosecution of other offenders engaged in serious criminal conduct;

(f) That the defendant by pleading has aided in avoiding delay in the disposition of other cases and thereby has contributed to the efficient administration of criminal justice.

Comment—Rule 15

See comment following Rule 15.11.

Rule 15.05 Plea Withdrawal

Subd. 1. To Correct Manifest Injustice. The court shall allow a defendant to withdraw a plea of guilty upon a timely motion and proof to the satisfaction of the court that withdrawal is necessary to correct a manifest injustice. Such a motion is not barred solely because it is made after sentence. If a defendant is allowed to withdraw a plea after sentence, the court shall set aside the judgment and the plea.

Subd. 2. Before Sentence. In its discretion the court may also allow the defendant to withdraw a plea at any time before sentence if it is fair and just to do so, giving due consideration to the reasons advanced by the defendant in support of the motion and any prejudice the granting of the motion would cause the prosecution by reason of actions taken in reliance upon the defendant's plea.

Subd. 3. Withdrawal of Guilty Plea Without Asserting Innocence. The defendant may move to withdraw a plea of guilty without an assertion of not guilty of the charge to which the plea was entered.

Comment—Rule 15

See comment following Rule 15.11.

Rule 15.06 Plea Discussions and Agreements Not Admissible

If the defendant enters a plea of guilty which is not accepted or which is withdrawn, neither the plea discussions, nor the plea agreement, nor the plea shall be received in evidence against or in favor of the defendant in any criminal, civil, or administrative proceeding.

Comment—Rule 15

See comment following Rule 15.11.

Rule 15.07 Plea to Lesser Offenses

With the consent of the prosecuting attorney and the approval of the court, the defendant shall be permitted to enter a plea of guilty to a lesser included offense or to an offense of lesser degree. Upon motion of the defendant and hearing thereon the court may accept a plea of guilty to a lesser included offense or to an offense of lesser degree, provided the court is satisfied following hearing that the prosecution cannot introduce evidence sufficient to justify the submission of the offense charged to the jury or that it would be a manifest injustice not to accept the plea. In either event, the plea may be entered without amendment of the indictment, complaint or tab charge. However, in felony cases, if the indictment or complaint is not amended, the reduction of the charge to an included offense or an offense of lesser degree shall be done in writing or on the record and if done only on the record, the proceedings shall be transcribed and filed.

Comment—Rule 15

See comment following Rule 15.11.

Rule 15.08 Plea to Different Offense

With the consent of the prosecuting attorney and the defendant, the defendant may enter a plea of guilty to a different offense than that charged in the original tab charge, indictment, or complaint. If the different offense is a felony or gross misdemeanor, a new complaint shall be signed by the prosecuting attorney and filed in the district court. The complaint shall be in the form prescribed by Rule 2.01 and Rule 2.03 except that it need not be made upon oath and the facts establishing probable cause to believe the defendant committed the offense charged need not be provided. If the different offense is a misdemeanor , the defendant may be charged by complaint or tab charge as provided in Rule 4.02, subd. 5(3) with the new offense and the original charge shall be dismissed.

Comment—Rule 15

See comment following Rule 15.11.

Rule 15.09 Record of Proceedings

Upon a guilty plea to an offense punishable by incarceration, either a verbatim record of the proceedings shall be made, or in the case of misdemeanors, a petition to enter a plea of guilty, as provided in the Appendix B to Rule 15, shall be filed with the court. If a written petition to enter a plea of guilty is submitted to the court, it shall be in the appropriate form as set forth in the Appendices to this rule. The defendant, prosecution, or any person may, at their expense, order a transcript of the verbatim record made in accordance with this rule. When requested, the transcript must be completed within 30 days of the date the transcript was requested in writing and satisfactory financial arrangements were made for the transcription.

Comment—Rule 15

See comment following Rule 15.11.

Rule 15.10 Guilty Plea to Offenses From Other Jurisdictions

Following a plea of guilty or a verdict or finding of guilty, the defendant may request permission to plead guilty to any other offense committed by the defendant within the jurisdiction of other courts in the state. The offense must be charged by and the plea must be approved by the prosecuting attorney having authority to charge the offenses.

Any fines imposed and collected upon a guilty plea entered under this rule to an offense arising in another jurisdiction shall be remitted by the clerk of the court imposing the fine to the clerk of the court which originally had jurisdiction over the offense. The clerk of the court of original jurisdiction upon receiving the remittance shall disburse it as required by law for similar fines.

Comment—Rule 15

See comment following Rule 15.11.

Rule 15.11 Use of Guilty Plea Petitions When Defendant Handicapped in Communications

In all cases in which a defendant is handicapped in communication because of difficulty in speaking or comprehending the English language, the court may not accept a guilty plea petition unless the defendant is first able to review it with the assistance of a qualified interpreter and the court establishes on the record that this has occurred. Whenever practicable, the court should use multilingual guilty plea petitions to insure that the defendant understands all rights being waived, the nature of the proceedings, and the petition.

Comment—Rule 15

Rule 15.01 adopts in principle ABA Standards, Pleas of Guilty, 1.4-1.6 (Approved Draft, 1968) as to the advice which shall be given to and the inquiry that shall be made of a defendant before acceptance of a plea of guilty to provide assurance that the defendant understands the nature of the charge and the consequences of the plea, including the relinquishment of constitutional rights (Boykin v. Alabama, 395 U.S. 238 (1969)); that the plea is voluntary; and that it has a factual basis. See also State v. Johnson, 279 Minn. 209, 156 N.W.2d 218 (1968).

Rule 15.01 differs from the ABA Standards and from F.R.Crim.P. 11 in that the Rule sets forth a detailed inquiry, following substantially that suggested in Jones, Minnesota Criminal Procedure, 3rd Edition, § 31, p. 80. (See also Preliminary Draft of Proposed Amendments to the F.R.Crim.P. 11 (1971), 52 F.R.D. 409, 415.) Although a failure to include all of the interrogation set forth in Rule 15.01 will not in and of itself invalidate a plea of guilty, a complete inquiry as provided for by the rule will in most cases assure and provide a record for a valid plea. Rule 15.01 also differs in its requirement that the court make certain that a defendant handicapped in communication has a qualified interpreter. This comports with the general requirement for interpreter services established in Rule 5.01 and Minn. Stat. §§ 611.31- 611.34 (1992) and emphasizes the critical importance of this service in the guilty plea process.

The inquiry required by paragraph 10.c. of Rule 15.01 and by paragraph 2 of Rule 15.02 concerning deportation and related consequences is similar to that required in a number of other states. See, e.g., California, Cal. Penal Code § 1016.5; Connecticut, Conn. Gen. Stat. Ann. § 54-1 j; Massachusetts, Mass. Gen. Laws Ann. ch. 278, § 29D; New York, N.Y. Crim. Proc. Law § 220.50 (7); Ohio, Ohio Rev. Code Ann. § 2943.031; Oregon, Or. Rev. Stat. § 135.385; Texas, Tex. Code Crim. Proc. Ann. art. 26.13; and Washington, Wash. Rev. Code Ann. § 10.40.200. In the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (1996), Congress extensively amended the Immigration and Nationality Act and greatly expanded the grounds for deportation of non-citizens convicted of crimes. Consequently, many non-citizens pleading guilty to felony charges and even to a number of non-felony charges will subject themselves to deportation proceedings. The consequences of such proceedings will often be more severe and more important to the non-citizen defendant than the consequences of the criminal proceedings. It is therefore appropriate that defense counsel advise non-citizen

defendants of those consequences and that the court inquire to be sure that has been done. As to the obligation of defense counsel in such situations, see ABA Standards for Criminal Justice, Pleas of Guilty, 14-3.2 (2d ed. 1982). The requirement of inquiring into deportation and immigration consequences does not mean that other unanticipated non-criminal consequences of a guilty plea will justify later withdrawal of that plea. See Kim v. State, 434 N.W.2d 263 (Minn. 1989) (unanticipated employment consequences).

Before entry of a guilty plea, defense counsel should review with the defendant the effect of the Minnesota Sentencing Guidelines on the case. Further, it may be desirable for the court to order a pre-plea sentencing guidelines worksheet to be prepared so that the court, the defendant, and both counsel will be aware of the effect of the guidelines at the time the guilty plea is entered.

Rule 15.01 requires that the inquiry be made by the court with the assistance of the prosecuting attorney and defense counsel.

It is suggested by the Advisory Committee that it is desirable to have the defendant sign a Petition to Plead Guilty in the form of the petition appearing in the Appendices to these rules (which contain in even more detailed form the information showing the defendant's understanding of defense rights and the consequences of pleading), and that the defendant be asked upon the inquiry under Rule 15.01 to acknowledge signing the petition, that the defendant has read the questions set forth in the petition or that they have been read to the defendant and that the defendant understands them, that the defendant gave the answers set forth in the petition, and that they are true. This petition is presently in use in some counties in Minnesota.

Such extensive questioning in a misdemeanor case, Rule 15.02, would not be possible considering the large number of such cases. Nevertheless, where a defendant is subjected to the possibility of a fine and 90 days incarceration, justice requires that the court inform the defendant at least of fundamental constitutional rights, the elements of the offense charged, and the possible consequences of a guilty plea. The court in State v. Casarez, 295 Minn. 534, 203 N.W.2d 406 (1973) applied the Boykin standard to misdemeanors, holding that a misdemeanor guilty plea must be vacated where the record does not show a knowing and voluntary waiver of the defendant's constitutional rights. It is clear then that at least some limited inquiry is necessary on the record before a misdemeanor guilty plea is accepted, and Rule 15.02 prescribes the minimal standards for this questioning.

Care must be taken in accepting a misdemeanor guilty plea or the use of that conviction to aggravate a later misdemeanor to a gross misdemeanor may be endangered. A prior uncounseled guilty plea cannot be used to aggravate a later charge absent a valid waiver of counsel on the record for the earlier plea. State v. Nordstrom, 331 N.W.2d 901 (Minn.1983). Also, a prior guilty plea which lacks a factual basis on the record cannot be used to aggravate a later charge. State v. Stewart, 360 N.W.2d 463 (Minn.Ct.App.1985). Careful use of the Misdemeanor Petition to Enter Plea of Guilty set forth in Appendix B should avoid these problems.

Under Rule 15.03, subd. 1, the inquiry upon entry of a guilty plea may be conducted by the court, defense counsel or the prosecutor as the court may direct. The questioning shall cover in substance the defendant's knowledge of the offense charged; the potential sentence; and the waiver of the defendant's rights to counsel, to a jury trial,

to confront witnesses, to subpoena witnesses, to remain silent, to the presumption of innocence, and to require proof of guilt beyond a reasonable doubt. The court shall also ask the defendant whether the defendant understands the nature of the offense charged and whether the defendant believes that what the defendant did constitutes the offense to which the defendant is pleading guilty. The court shall determine whether there is a factual basis for the plea. Since even this minimal inquiry, if conducted for each defendant, would cause much delay and repetition, alternative methods are provided by Rule 15.03, subd. 2. Where a number of defendants are to be arraigned consecutively and are all present in the courtroom, Rule 15.03, subd. 1 provides that the court may advise them as a group of the possible consequences of a guilty plea and of their constitutional rights. The court must first determine whether any of the defendants are handicapped in communication, as that term is defined in Rule 5.01 and Minn. Stat. § 611.31 (1992). If any are, the court must provide a qualified interpreter for each such defendant and both the need for this service and the provision of it for each defendant who requires it must be noted on the record. Rule 5.01; Minn. Stat. §§ 611.31- 611.34 (1992). The court must provide any such defendant with the information contained in the warning individually. If this procedure is followed, each defendant who has received a group warning, when appearing individually before the court must be asked whether the defendant heard and understood the earlier statement by the court. The defendant must then be individually questioned as to waiver of the constitutional rights previously explained; as to understanding the nature of the offense charged; as to believing that what the defendant did constitutes the offense to which the defendant is pleading guilty; and as to the factual basis for the plea. To further save time, the statement of rights required by Rule 5.01 upon a defendant's first appearance in court may be combined with the questioning required by this rule.

Rule 15.03, subd. 2(2) provides the second alternative method of entering a plea of guilty. Under this rule a "Petition to Enter Plea of Guilty" as provided for in the Appendix B to Rule 15, may be completed and filed with the court. This petition in written form contains in substance the information and questions required by Rule 15.03, subd. 1. When properly completed the petition may be filed by either the defendant or defense counsel and it is not necessary for the defendant to personally appear in court when the petition is presented to the court. (See Rule 15.03, subd. 2). See Mills v. Municipal Court, 110 Cal.Rptr. 329 (1973) where the California court approved the use of a similar petition. If the court is satisfied that the plea is being knowingly and voluntarily entered according to the standards of Rule 15.01, subd. 1 it shall dispose of the tendered plea in the same manner as if the defendant were entering the plea orally and in person.

The defendant's right to counsel at the proceedings under Rule 15 is covered by Rule 13.03 (Arraignment In Felony and Gross Misdemeanor Cases).

Rule 15.01, parts 10, 11, 12, following ABA Standards, Pleas of Guilty, 1.5 (Approved Draft, 1968), requires the court to ascertain whether there has been a plea agreement, what it is, whether the defendant understands it and also understands that if the court disapproves the agreement, the defendant has the absolute right to withdraw the plea. Under Rule 15.04, subd. 3(1), the court shall advise the defendant if the plea agreement is rejected (unless the court decides to postpone approval or rejection until the pre-sentence report is received), and shall give the defendant an opportunity to withdraw the plea, if one has been entered.

Rule 15.04, subd. 1 regarding the propriety of plea discussions and agreements follows the language of ABA Standards, Pleas of Guilty, 3.1(a) (Approved Draft, 1968). Instead of specifying what the subject matter of a plea agreement shall be (See ABA Standards, Pleas of Guilty, 3.1(b) (Approved Draft, 1968)) Rule 15.04, subd. 1 refers to the more general considerations which under Rule 15.04, subd. 3(2) shall govern the prosecuting attorney in determining whether to enter into a plea agreement. See Minn. Stat. § 611A.03 regarding the prosecutor's duties under the Victim's Rights Act to make a reasonable and good faith effort to inform of proposed plea agreements and to notify of the right to be present at sentencing to make any objection to the plea agreement or to the proposed disposition.

Rule 15.04, subd. 2, which refers to the relationship between defense counsel and the defendant in connection with a plea agreement, follows ABA Standards, Pleas of Guilty, 3.2(a) (Approved Draft, 1968).

Rule 15.04, subd. 3(1) is adapted from ABA Standards, Pleas of Guilty, 3.3(b) (Approved Draft, 1968) and authorizes the trial court to permit disclosure of a plea agreement in advance of the tender of the plea of guilty. When the defendant is questioned under Rule 15.01, the court shall inform the defendant if the plea agreement is rejected unless the court decides to postpone a decision on acceptance or rejection until the pre-sentence report is received, and shall give the defendant an opportunity to withdraw a plea of guilty, if entered. Whenever the court rejects the plea agreement, whether on tender of plea or after receipt of the pre-sentence report, or after plea, the court shall so inform the defendant and give the defendant an opportunity to affirm or withdraw the plea, if entered, and if the defendant has made factual disclosures tending to disclose guilt of the offense charged, the judge should disqualify himself or herself from the trial of the case.

Rule 15.04, subd. 3(2) sets forth the considerations that shall guide the prosecuting attorney in determining whether to enter into a plea agreement and what the plea agreement shall be, and it also contains the considerations that shall govern the court in deciding whether to accept the agreement. This rule is taken from ABA Standards, Pleas of Guilty, 1.8 (Approved Draft, 1968). Rule 15.04, subd. 3(2)(d) is intended to cover the situations in which innocent witnesses or victims, such as young children involved in sexual offenses, may be protected from unnecessary publicity.

Rule 15.05, subd. 1 authorizing the withdrawal of a plea of guilty to correct manifest injustice follows the principles set by ABA Standards, Pleas of Guilty, 2.1(a) (Approved Draft, 1968), but does not provide guidelines for determining whether a motion for withdrawal of the plea is timely or whether withdrawal is necessary to correct manifest injustice. (In this respect the rule differs from ABA Standards, Pleas of Guilty, 2.1(a)(i), (ii) (Approved Draft, 1968). This is left by the rule to judicial decision. (See, e.g., Chapman v. State, 282 Minn. 13, 162 N.W.2d 698 (1968).)

Whenever a plea agreement has been rejected, the defendant shall be afforded the opportunity to withdraw a plea of guilty, if entered (Rules 15.04, subd. 3(1); 15.01).

The court shall permit withdrawal of a plea of guilty to correct manifest injustice whether the motion is made before or after sentence. (Rule 15.05, subd. 1).

Rule 15.05, subd. 2 permits the court in its discretion to allow the defendant to

withdraw a guilty plea before sentence under the conditions specified in the rule. (Compare Minn. Stat. § 630.29 (1971) which does not prescribe guidelines.)

Rule 15.05, subd. 3 permitting a motion to withdraw a plea of guilty without asserting innocence is taken from ABA Standards, Pleas of Guilty, 2.1(a)(iii) (Approved Draft, 1968).

Rule 15.06 making plea discussions and plea agreements inadmissible in evidence follows ABA Standards, Pleas of Guilty, 3.4 (Approved Draft, 1968). Rule 15.06 is consistent with Rule 410 of the Minnesota Rules of Evidence which also governs the admissibility of evidence of a withdrawn plea of guilty. Rule 410 is broader in that it makes inadmissible evidence relating to withdrawn pleas from other jurisdictions including withdrawn pleas of nolo contendere from those jurisdictions which allow such a plea.

Rule 15.07 permits a defendant to plead to a lesser offense with the approval of the court if the prosecuting attorney consents. (This is substantially the same as Minn. Stat. § 630.30 (1971) which requires the approval of the court.)

The rule also authorizes the court on defendant's motion and following a hearing thereon to permit the defendant to plead to a lesser offense without the consent of the prosecuting attorney. In accordance with State v. Carriere, 290 N.W.2d 618 (Minn.1980), such a plea is permitted only if the court is satisfied, following a hearing, that the prosecution could not present sufficient admissible evidence to justify submission of the offense charged to the jury. Under State v. Carriere, supra, the showing required of the prosecution in order to withstand the defendant's motion would be in the nature of an offer of proof. Further, the hearing must be in open court and the court's order must include a detailed statement of the reasons for its ruling on the motion. Rule 15.07 also permits a plea to a lesser offense over the prosecutor's objection to prevent a manifest injustice. Rule 15.07 does not require that the indictment or complaint be amended. (See State v. Oksanen, 276 Minn. 103, 149 N.W.2d 27 (1967).) However, if the indictment or complaint is not amended the rule requires that for felonies the reduction of the charge must be done in writing or on the record. If it is done only on record the proceedings must be transcribed and filed to assure that the court file will always reflect the disposition of all felony charges.

Rule 15.08 permits a plea of guilty to a different offense than that charged in the original complaint, tab charge or indictment with the consent of the defendant and prosecuting attorney. In that event for felonies and gross misdemeanors, other than those under Minn. Stat. § 169.121 or Minn. Stat. § 169.129, a new complaint shall be filed, but need not be made on oath and need not provide evidence establishing probable cause. (See also Rule 11.06). In misdemeanor cases and gross misdemeanor cases under Minn. Stat. § 169.121 or Minn. Stat. § 169.129, the procedure is also permitted, but the defendant will be tab charged with the new offense as provided by Rule 4.02, subd. 5(3), and the original charge or charges will be dismissed upon entry of the guilty plea to the new charge.

Rule 15.09, requiring a record of the proceedings on a plea of guilty, is in accord with ABA Standards, Pleas of Guilty, 1.7 (Approved Draft, 1968). In misdemeanor cases, the rule provides the alternative, however, of filing a petition to enter a guilty plea as provided for in Rule 15.03, subd. 2, and in the Appendix B to Rule 15. This provision for

either a verbatim record or a petition is included to satisfy the constitutional requirement that a plea to a misdemeanor offense punishable by incarceration must be shown on the record to be knowingly and voluntarily entered. See State v. Casarez, 295 Minn. 534, 203 N.W.2d 406 (1973); Boykin v. Alabama, 89 S.Ct. 1709, 395 U.S. 238, 23 L.Ed.2d 274 (1969); and Mills v. Municipal Court, 110 Cal.Rptr. 329, 515 P.2d 273, 10 Cal.3d 288 (1973). The verbatim record may be made by a court reporter or recording equipment (see Minnesota Statutes, section 487.11, subd. 2 (1971)). The verbatim record need not be transcribed unless requested by the defendant, the prosecuting attorney, or any other person. If a transcript is requested, it then must be completed within 30 days after the request is made in writing and satisfactory arrangements are made for payment of the transcript.

Rule 15.10, which permits a defendant to plead guilty to misdemeanor, gross misdemeanor, or felony offenses from other jurisdictions in certain circumstances, is based on Unif.R.Crim.P. 444(e) (1987). It is similar to Rule 5.04, subd. 2, which previously authorized such pleas in misdemeanor cases, but is broader in that such pleas are permitted after a verdict or finding of guilty as well as after a guilty plea. Before proceeding under this rule, it is necessary for the prosecuting attorney having authority to charge the offense to charge the defendant in the jurisdiction having venue. This may be done by complaint or indictment or, for misdemeanors by tab charge. The charging document may be transmitted to the jurisdiction where the plea is to be entered by facsimile transmission under Rule 33.05.g

If the defendant is handicapped in communication due to difficulty in speaking or comprehending English, the court may not accept a guilty plea petition until the defendant has been able to review it with the assistance of a qualified interpreter, and the court establishes on the record that this has occurred. See Final Report of the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, Chapter 2, recommendation 11. It is strongly recommended that when the defendant is handicapped in communication due to difficulty in speaking or comprehending English, a multilingual guilty plea petition be used which would be both in English and a language in which the defendant is able to communicate. The use of a multilingual petition would help assure that the translation is accurate and is preferable to the use of a petition which contains only the language other than English.

Rule 16. Misdemeanor Prosecution by Indictment

In misdemeanor cases prosecuted by indictment, to the extent that Rule 19 conflicts with other rules, Rule 19 shall govern.

Comment—Rule 16

The grand jury, with its power under Minn. Stat. § 628.02 to inquire into all "public offenses", could indict a defendant on misdemeanor charges. In those rare cases, Rule 16 provides that the prosecution shall be governed by Rule 19 in those instances where Rule 19 conflicts with those rules that would otherwise govern the misdemeanor prosecution.

Rule 17. Indictment, Complaint and Tab Charge

Rule 17.01 Prosecution by Indictment, Complaint or Tab Charge

An offense which may be punished by life imprisonment shall be prosecuted by indictment, but the prosecution may proceed by a complaint following an arrest without a warrant or as the basis for the issuance of a warrant of arrest. The procedure thereafter shall be in accordance with the provisions of Rules 8 and 19. Any other offense defined by state law may be prosecuted by indictment or by a complaint as provided by Rule 2. Misdemeanors and designated gross misdemeanors as defined by Rule 1.04(b) may be prosecuted by tab charge, provided that for any such designated gross misdemeanors, a complaint shall be subsequently made, served and filed as required by Rule 4.02, subd. 5(3).

The arrest of a person under a warrant of arrest issued upon a complaint under Rule 3 or the filing of a complaint under Rule 4.02, subd. 5(2) against a person arrested without a warrant shall not preclude an indictment for the offense charged in the complaint or for an offense arising from the conduct upon which the charge in the complaint was based.

Comment—Rule 17

See comment following Rule 17.06.

Rule 17.02 Nature and Contents

Subd. 1. Complaint. A complaint shall be substantially in the form prescribed by Rule 2.

Subd. 2. Indictment. An indictment shall contain a written statement of the essential facts constituting the offense charged. It shall be signed by the foreperson of the grand jury.

Subd. 3. Indictment and Complaint. The indictment or complaint shall state for each count the citation of the statute, rule, regulation or other provision of law which the defendant is alleged to have violated. Error in the citation or its omission shall not be ground for dismissal or for reversal of a conviction if the error or omission did not prejudice the defendant. Each count may charge only one offense. Allegations made in one count may be incorporated by reference in another count. An indictment or complaint may, but need not, contain counts for the different degrees of the same offense, or for any of such degrees, or counts for lesser or other included offenses, or for any of such offenses. The same indictment or complaint may contain counts for murder, and also for manslaughter, or different degrees of manslaughter. When the offense may have been committed by the use of different means, the indictment or complaint may allege in one count the means of committing the offense in the alternative or that the means by which the defendant committed the offense are unknown.

Subd. 4. Bill of Particulars. The bill of particulars is abolished.

Subd. 5. Indictment and Complaint Forms--Felony and Gross Misdemeanors. For all indictments and complaints charging a felony or gross misdemeanor offense the prosecuting attorney or such judge or judicial officer authorized by law to issue process pursuant to Rule 2.02 shall use an appropriate form authorized and supplied by the State Court Administrator or a word processor-produced complaint or indictment form in

compliance with the supplied form and approved by Information Systems Office, State Court Administration. If for any reason such form is unavailable, failure to comply with this rule shall constitute harmless error under Rule 31.01.

Comment—Rule 17

See comment following Rule 17.06.

Rule 17.03 Joinder of Offenses and of Defendants

Subd. 1. Joinder of Offenses. When the defendant's conduct constitutes more than one offense, each such offense may be charged in the same indictment or complaint in a separate count.

Subd. 2. Joinder of Defendants.

(1) Felony and Gross Misdemeanor Cases. When two or more defendants are jointly charged with a felony, they may be tried separately or jointly in the discretion of the court. In making its determination on whether to order joinder or separate trials, the court shall consider the nature of the offense charged, the impact on the victim, the potential prejudice to the defendant, and the interests of justice. In cases other than felonies, defendants jointly charged may be tried jointly or separately, in the discretion of the court. In all cases any one or more of said defendants may be convicted or acquitted.

(2) Misdemeanor Cases. Defendants jointly charged may be tried jointly or separately, in the discretion of the court. In all cases, any one or more of said defendants may be convicted or acquitted.

Subd. 3. Severance of Offenses or Defendants. Misjoinder of offenses or charges or defendants shall not be grounds for dismissal, but on motion, offenses or defendants improperly joined shall be severed for trial.

(1) Severance of Offenses. On motion of the prosecuting attorney or the defendant, the court shall sever offenses or charges if:

(a) the offenses or charges are not related;

(b) before trial, the court determines severance is appropriate to promote a fair determination of the defendant's guilt or innocence of each offense or charge; or

(c) during trial, with the defendant's consent or upon a finding of manifest necessity, the court determines severance is necessary to achieve a fair determination of the defendant's guilt or innocence of each crime.

(2) Severance from Codefendant because of Codefendant's Out-of-Court Statement. On motion of a defendant for severance from codefendant because a codefendant's out-of-court statement refers to, but is not admissible against, the defendant, the court shall determine whether the prosecuting attorney intends to offer the statement as evidence as part of its case in chief. If so, the court shall require the prosecuting attorney to elect one of the following options:

(a) a joint trial at which the statement is not received in evidence;

(b) a joint trial at which the statement is received in evidence only after all references to the defendant have been deleted, if admission of the statement with the deletions will not prejudice the defendant; or

(c) severance of the defendant.

(3) Severance of Defendants During Trial. The court shall sever defendants

during trial with the defendant's consent or upon a finding of manifest necessity, if the court determines severance is necessary to achieve a fair determination of the guilt or innocence of one or more of the defendants.

Subd. 4. Consolidation of Indictments, Complaints or Tab Charges for Trial. The court on motion of the prosecution or on its initiative may order two or more indictments, complaints, tab charges or any combination thereof to be tried together if the offenses and the defendants, if there is more than one, could have been joined in a single indictment, complaint or tab charge. On motion of the defendant, the court may order two or more indictments, complaints, tab charges, or any combination thereof to be tried together even if the offenses and the defendants, if there be more than one, could not have been joined in a single indictment, complaint or tab charge. The procedure shall be the same as if the prosecution were under such single indictment, complaint or tab charge.

Subd. 5. Dual Representation. When two or more defendants are jointly charged or will be tried jointly under subdivisions 2 or 4 of this rule, and two or more of them are represented by the same counsel, the procedure hereafter outlined shall be followed before plea and trial.

(1) The court shall address each defendant personally on the record, advise the defendant of the potential danger of dual representation, and give the defendant an opportunity to question the court on the nature and consequences of dual representation.

(2) The court shall elicit from each defendant in a narrative statement that the defendant has been advised of the right to effective representation; that the defendant understands the details of defense counsel's possible conflict of interest and the potential perils of such a conflict; that the defendant has discussed the matter with defense counsel, or if the defendant wishes with outside counsel and that the defendant voluntarily waives the Sixth Amendment protections.

Comment—Rule 17

See comment following Rule 17.06.

Rule 17.04 Surplusage

The court on motion may strike surplusage from the indictment, complaint, or tab charge.

Comment—Rule 17

See comment following Rule 17.06.

Rule 17.05 Amendment of Indictment or Complaint

The court may permit an indictment or complaint to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced.

Comment—Rule 17

See comment following Rule 17.06.

Rule 17.06 Motions Attacking Indictment, Complaint or Tab Charge

Subd. 1. Defects in Form. No indictment, complaint or tab charge shall be dismissed nor shall the trial, judgment or other proceedings thereon be affected by reason of a defect or imperfection in matters of form which does not tend to prejudice the substantial rights of the defendant.

Subd. 2. Motion to Dismiss or for Appropriate Relief. All objections to an indictment, complaint or tab charge shall be made by motion as provided by Rule 10.01 and may be based on the following grounds without limitation:

(1) Indictment.

(a) The evidence admissible before the grand jury was not sufficient as required by these rules to establish the offense charged or any lesser or other included offense or any offense of a lesser degree;

(b) The grand jury was illegally constituted;

(c) The grand jury proceeding was conducted before fewer than 16 grand jurors;

(d) Fewer than 12 grand jurors concurred in the finding of the indictment;

(e) The indictment was not found or returned as required by law;

(f) An unauthorized person was in the grand jury room during the presentation of evidence upon the charge contained in the indictment or during the deliberations or voting of the grand jury upon the charge.

(2) Indictment, Complaint or Tab Charge. In the case of an indictment, complaint or tab charge:

(a) The indictment, complaint or tab charge does not substantially comply with the requirements prescribed by law to the prejudice of the substantial rights of the defendant;

(b) The court lacks jurisdiction of the offense charged;

(c) The law defining the offense charged is unconstitutional or otherwise invalid;

(d) In the case of an indictment or complaint, that the facts stated do not constitute an offense;

(e) The prosecution is barred by the statute of limitations;

(f) The defendant has been denied a speedy trial;

(g) There exists some other jurisdictional or legal impediment to prosecution or conviction of the defendant for the offense charged, except as provided by Rule 10.02;

(h) Double jeopardy, collateral estoppel, or that prosecution is barred by Minn. Stat. § 609.035.

Subd. 3. Time for Motion. A motion to dismiss the indictment, complaint or tab charge shall be made within the time prescribed by Rule 10.04, subd. 1 except that an objection to the jurisdiction of the court over the offense or that the indictment, complaint or tab charge fails to charge an offense may be made at any time during the pendency of the proceeding.

Subd. 4. Effect of Determination of Motion to Dismiss.

(1) Motion Denied. If a motion to dismiss the indictment, complaint or tab charge is determined adversely to the defendant, the defendant shall be permitted to plead if the defendant has not previously pleaded. A plea previously entered shall stand. The

defendant in a misdemeanor case may continue to raise the issues on appeal if convicted following a trial.

(2) Grounds for Dismissal. When a motion to dismiss an indictment, complaint or tab charge is granted for a defect in the institution of prosecution or in the indictment, complaint or tab charge, the court shall specify the grounds upon which the motion is granted.

(3) Dismissal for Curable Defect. If the dismissal is for failure to file a timely complaint as required by Rule 4.02, subd. 5(3), or for a defect that could be cured or avoided by an amended or new indictment, or complaint, further prosecution for the same offense shall not be barred, and the court shall on motion of the prosecuting attorney, made within seven (7) days after notice of the entry of the order granting the motion to dismiss, order that defendant's bail or the other conditions of his release be continued or modified for a specified reasonable time pending an amended or new indictment or complaint.

In misdemeanor cases, if the defendant is unable to post any bail that might be required under Rule 6.02, subd. 1, then the defendant must be released subject to such non-monetary conditions as the court deems appropriate under that rule. The specified time for such amended or new indictment or complaint shall not exceed sixty (60) days for filing a new indictment or seven (7) days for amending an indictment or complaint or for filing a new complaint. During the seven-day period for making the motion and during the time specified by the order, if such motion is made, dismissal of the indictment or complaint shall be stayed. If the prosecution does not make the motion within the seven-day period or if the indictment or complaint is not amended or if a new indictment or complaint is not filed within the time specified by the order, the defendant shall be discharged and further prosecution for the same offense shall be barred unless the prosecution has appealed as provided by law, or unless the defendant is charged with murder and the court has granted a motion to dismiss on the ground of the insufficiency of the evidence before the grand jury. In misdemeanor cases and also in designated gross misdemeanor cases as defined in Rule 1.04(b) dismissed for failure to file a timely complaint within the time limits as provided by Rule 4.02 subd. 5(3), further prosecution shall not be barred unless additionally a judge or judicial officer of the court has so ordered.

Comment—Rule 17

The first sentence of Rule 17.01 that an offense punishable by life imprisonment shall be prosecuted by indictment retains existing Minnesota law, which does not permit an information to be filed for that offense. (Minn. Stat. §§ 628.29, 628.32(6) (1971).) All other offenses may be prosecuted by indictment or complaint. The complaint takes the place of the information as an accusatory instrument. (See comment, Rules 2, 8.)

Under Rule 17.01 the fact that a complaint has been filed initially does not preclude an indictment while the complaint is pending or after it has been dismissed (except as provided in Rule 17.06, subd. 4).

Under Rule 17.01, a misdemeanor and also a designated gross misdemeanor as defined in Rule 1.04(b) may be prosecuted by complaint or by tab charge (See Rule 4.02, subd. 5(3)) under these rules. However, for any such designated gross misdemeanor prosecution the complaint must be subsequently made, served and filed within the time limits as provided by Rule 4.02, subd. 5(3). These offenses may also be prosecuted by

indictment and, in such cases, rules applicable to indictments shall apply.

The complaint by Rule 2.01 and the indictment by Rule 17.02, subd. 2 shall contain a written statement of the essential facts constituting the offense charged. (See F.R.Crim.P. 3, 7(c)(1).) The statement of the evidence, or the supporting affidavits, or sworn testimony, showing probable cause required by Rule 2.01 are not a part of the indictment.

Except to the extent that existing statutes (Minn. Stat. §§ 628.10- 628.13, 628.15- 628.18, 628.20- 628.24, 628.27 (1971)), governing the contents of an indictment or information are inconsistent with Rule 17.02, they are not intended to be abrogated by these rules. So, to the extent they are consistent with the provisions of Rule 17.02, they may be followed in drawing complaints and indictments under these rules.

The requirement of Rule 17.02, subd. 3 for the citation of the statute violated but that error in the citation or in its omission is harmless unless the defendant was prejudiced comes from F.R.Crim.P. 7(e)(1)(2). (See also Minn. Stat. § 628.19 (1971).)

Rule 17.02, subd. 3 permits counts to be used but prohibits duplicity by charging more than one offense in a single count.

Allegations by reference is taken from F.R.Crim.P. 7(c)(1).

Rule 17.02, subd. 3, following Minn. Stat. § 628.14 (1971), also permits--but does not require--counts for lesser offenses, and permits allegations in the alternative of the means of committing an offense. (The last sentence of § 628.14 permitting several counts describing the different "classes" to which an offense might belong was not included in the rule because of its ambiguity.)

Rule 17.02, subd. 4 abolishes the bill of particulars. The information supplied by a bill of particulars may be obtained by discovery under Rules 9 or 7.03. If the indictment or complaint is deficient a motion may be made under Rule 17.06, subd. 2(2) and if granted, the indictment or complaint may be amended in accordance with Rule 17.06, subd. 4(3).

If the defect is one that can be cured by an amendment or new indictment or complaint, dismissal is automatically stayed for 7 days during which the prosecuting attorney may move that the stay be continued and the defendant's bail or other conditions of release be continued or modified pending amendment or a new indictment or complaint. (Rule 17.06, subd. 4(3)).

If the motion is made, the further stay for that purpose shall be granted but not for more than 60 days for a new indictment (See Rules 18.01, subd. 1; 18.09) or more than 7 days for an amendment or new complaint. The 60-day period permitted for a new indictment allows for the additional time needed to draw and summon the grand jurors and witnesses and to present the case to the grand jury.

If the motion is not made within the 7-day time period for making the motion, or if no new indictment is returned within the 60-day period or amendment or new complaint filed within the 7-day period, the case shall be dismissed, the defendant discharged, and further prosecution is barred, unless the prosecution appeals as

provided by law (See Minn. Stat. §§ 632.11- 632.13 (1971)), or unless the defendant is charged with murder and the court has granted the motion to dismiss on the ground that the evidence before the grand jury was insufficient to establish probable cause. (See Rules 7.06, subd. 2(1)(a); 18.06). It was the opinion of the Advisory Committee that an exception should be made in the case of murder in view of the seriousness of the offense and the absence of a statute of limitations.

Rule 17.03, subd. 1, governing joinder of offenses, adopts the provisions of Minn. Stat. § 609.035 (1971) leaving its judicial interpretations to judicial decision.

Rule 17.03, subd. 2(2), governing the joinder of defendants in misdemeanor cases, adopts the provisions of Minn. Stat. § 631.03 (repealed, 1979 c 233 § 42) which permitted the joinder of two or more defendants when they are jointly charged with the commission of an offense. Severance of offenses or defendants already joined is governed by Rule 17.03, subd. 3.

Rule 17.03, subd. 3, providing that improper joinder of offenses or defendants is not a ground for dismissal but only for mandatory severance, abrogates Minn. Stat. § 630.23(3) which lists misjoinder of offenses as a ground for demurrer. When defendants are properly already joined, severance is governed by Rule 17.03, subd. 2 and Rule 17.03, subd. 3. Part (1) of Rule 17.03, subd. 3, concerning severance of offenses is taken from Unif.R.Crim.P. 472(a) (1987) which is based on ABA Standards for Criminal Justice 13-3.1(a) and (b) (1985). Part (2) of the rule, concerning severance of defendants because of out-of-court statements by a codefendant, is taken from Unif.R.Crim.P. 472(b)(1) (1987) which is based on ABA Standards for Criminal Justice 13-3.2(a) (1985). Part (3) of the rule, concerning severance of defendants during trial is taken from Unif.R.Crim.P. 472(b)(2)(ii) (1987) which is based on ABA Standards for Criminal Justice 13-3.2(b)(ii) (1985).

Rule 17.03, subd. 4, permitting consolidation of indictments, complaints and tab charges follows F.R.Crim.P. 13.

The procedures required by Rule 17.03, subd. 5 concerning representation by the same counsel of two or more defendants jointly charged or tried are taken from State v. Olsen, 258 N.W.2d 898 (Minn.1977). That case requires that the waiver of Sixth Amendment rights obtained from the defendant must be stated in clear and unequivocal language. If a record is not made as required or if the record fails to show that the procedures were followed in every important respect, State v. Olsen, supra, places the burden on the prosecution to establish beyond a reasonable doubt that a prejudicial conflict of interest did not exist.

The provision of Rule 17.04 for striking surplusage is taken from F.R.Crim.P. 7(d).

Rule 17.05 permitting an amendment of an indictment, complaint or tab charge at any time before verdict or finding unless the defendant will be substantially prejudiced follows F.R.Crim.P. 7(e) and takes the place of the second sentence of Minn. Stat. § 628.19 (1971). The rule leaves to the trial court the determination of whether the defendant will be substantially prejudiced by an amendment and what steps, if any, including a continuance, may be taken to remove any prejudice that might otherwise result from an amendment. Rule 17.05 does not govern the amendment of a complaint

after a mistrial and before start of the second trial. Rather, Rule 3.04, subd. 2 which provides for the free amendment of the complaint controls. State v. Alexander, 290 N.W.2d 745 (Minn.1980).

Rule 17.06, subd. 1, precluding dismissal for defects in form follows the language of the first sentence of Minn. Stat. § 628.19 (1971).

In addition to the motion to dismiss an indictment for disqualification of individual jurors or the jury panel (See Rule 18.02, subd. 2), Rule 17.06, subd. 2 provides that all objections to an indictment, complaint or tab charge shall be by motion to dismiss or for appropriate relief (Rule 10.01), thus abolishing the demurrer (Minn. Stat. § 630.23 (1971)) and motion to quash or set aside (Minn. Stat. § 630.18) provided by existing law, and superseding those statutes to the extent they are inconsistent with the rule.

Grounds for a motion for dismissal of an indictment only and for a motion for dismissal of an indictment or complaint are set forth in Rule 17.06, subd. 2(1) and (2). These grounds are not intended to be exclusive.

Rule 17.06, subd. 2(1)(a) providing for a motion for dismissal of an indictment for lack of admissible evidence showing probable cause is available because of the requirement of Rule 18.05, subd. 1 that a record be made of the evidence taken before the grand jury. (See also the provisions of 18.05, subd. 1 for the conditions in which the record may be disclosed to the defendant. And see also Rule 18.06, subd. 2.) Upon such a motion the admissibility and sufficiency of evidence pertaining to indictments are governed by Rules 18.06, subd. 1, and 18.06, subd. 2.

Rule 17.06, subd. 2(2)(f) listing denial of a speedy trial as a ground for dismissal leaves to judicial decision the constitutional or other requirements of a speedy trial as well as the effect of a denial of defendant's demand for trial under Rule 11.10 and Rule 6.06.

By Rule 10.04, subd. 1, a motion to dismiss an indictment or complaint shall be served not later than 3 days before the Omnibus Hearing under Rule 11 unless the time is extended for good cause. In misdemeanor cases, by Rule 17.06, subd. 3, a motion to dismiss a complaint or tab charge shall be served at least three days before the pretrial conference or, at least three days before the trial if no pretrial conference is held, unless this time is extended for good cause. Rule 17.06, subd. 4(1) provides that if a defendant's motion to dismiss is denied in a misdemeanor case the defendant may continue to raise the issue involved in the motion on direct appeal if convicted following a trial. The denial of a motion to dismiss based upon a challenge to the personal jurisdiction of the court could therefore be raised on direct appeal of a misdemeanor judgment of conviction. This reverses prior Minnesota case law, which permitted review in such cases only by writ of prohibition. See State v. Stark, 288 Minn. 286, 179 N.W.2d 597 (1970). Permitting the issue of personal jurisdiction to be raised on direct appeal avoids the inconvenience and delay which would often result from continuing the trial to allow the defendant to seek a writ of prohibition.

The first sentence of Rule 17.06, subd. 4, that if a motion to dismiss is decided adversely to the defendant, the defendant shall be permitted to plead if the defendant has not already done so and that a plea previously entered shall stand, is taken from F.R.Crim.P. 12(b)(5) and takes the place of similar provisions in Minn. Stat. §§ 630.19,

630.26 (1971). (See also Rule 11.10.) This rule contemplates that a defendant may plead not guilty and also make a motion to dismiss if the defendant wishes.

The balance of Rule 17.06, subd. 4 relating to the effect of a determination to dismiss the indictment, tab charge or complaint supersedes Minn. Stat. §§ 630.19-630.21, 630.25 (1971) and provides uniformity for that purpose. The rule is based on F.R.Crim.P. 12(h)(b). (See also Rule 3.04, subd. 2.)

In order that the basis of a dismissal for a defect in the institution of the prosecution or in the indictment or complaint may be apparent, Rule 17.06, subd. 4 requires the court to specify the grounds for granting the motion. Under Rule 17.06, subd. 4(3) if the dismissal is for failure to file a timely complaint as required by Rule 4.02, subd. 5(3) for misdemeanor cases and also for designated gross misdemeanor cases as defined in Rule 1.04(b) or for a defect which could be cured by a new complaint, the prosecutor may within 7 days after notice of entry of the order dismissing the case move to continue the case for the purpose of filing a new complaint. Upon such a motion the court shall continue the case for no more than 7 days pending the filing of a new complaint, or amending of the complaint or indictment or for 60 days pending the filing of a new indictment. This filing requirement for a new or amended complaint is not satisfied until the complaint is signed by the judge or other appropriate issuing officer and then filed with the court administrator.

During the time for such a motion and during any continuance, dismissal of the charge is stayed, but in a misdemeanor case, the defendant may not be kept in custody based on that charge. A defendant who cannot post bail in a misdemeanor case must be released subject to such nonmonetary conditions as the court deems appropriate under Rule 6.02, subd. 1. If no motion is made or if no new or amended complaint or indictment is filed within the times allowed, the defendant must be discharged and any further prosecution is barred unless the prosecution has appealed or unless the murder case exception applies. However, in misdemeanor cases and also in designated gross misdemeanor cases as defined in Rule 1.04(b) dismissed for failure to file a timely complaint within the time limits as provided by Rule 4.02, subd. 5(3), further prosecution is not automatically barred, but is barred only if so ordered by the court. If such a case is dismissed for failure to issue a complaint, but the 30-day time limit established by Rule 4.02, subd. 5(3), has not yet run, the prosecutor may still issue the complaint within the 30-day time limit even without bringing a motion under Rule 17.06, subd. 4(3). The court is not authorized under Rule 17.06, subd. 4(3), to bar further prosecution before the 30-day time limit has run. Before this time limit has run, however, the court may order that further prosecution shall be barred if a valid complaint is not issued within the 30-day time limit. If no complaint is then issued within the 30 days, prosecution is barred without the necessity of further motions, court appearances, or orders. Rule 17.06, subd. 4(3), does not govern dismissals for defects that could not be cured at the time of dismissal by a new or amended complaint or indictment. Therefore, when a complaint or indictment has been dismissed because of insufficient evidence to establish probable cause, the prosecutor may re-prosecute if further evidence is later discovered to establish probable cause. The prosecutor may not reinstitute the charge by a tab charge under Rule 4.02, subd. 5(3) even for a misdemeanor. Also under Rule 4.02, subd. 5(3), even if prosecution is reinstituted within the specified period after having been dismissed for failure to file a timely complaint, a summons rather than a warrant must be issued to secure the appearance of the defendant in court.

Rule 18. Grand Jury

Rule 18.01 Summoning Grand Juries

Subd. 1. When Summoned. The district court, without regard to the beginning or ending of a term of court, shall order that one or more grand juries be drawn at least annually. The grand jury shall be summoned and convened whenever required by the public interest or whenever requested by the county attorney. Upon being drawn, each juror shall be notified of selection. The court shall prescribe by order or rule the time and manner of summoning grand jurors. Vacancies in the grand jury panel shall be filled in the same manner as provided by this rule.

Subd. 2. How Selected and Drawn. Except as otherwise provided by this rule with respect to St. Louis County, the grand jury list shall be composed of the names of persons selected at random from a fair cross-section of the residents of the county who are qualified by law to serve as jurors and shall otherwise be selected as provided by law. The grand jury shall be drawn from the grand jury list as prescribed by law.

In St. Louis County a grand jury list shall be selected at random from a fair cross-section of the residents of each of the 3 districts of the St. Louis County Court district as defined by Minn. Stat. § 487.01, subd. 5(1) who are qualified by law to serve as jurors. The grand jury list shall otherwise be selected and the grand jurors shall be drawn from the list as provided by law. Each grand jury so drawn shall serve only in that district of the St. Louis County Court district from which the members of the jury are drawn.

Comment—Rule 18

See comment following Rule 18.09.

Rule 18.02 Objections to Grand Jury and Grand Jurors

Subd. 1. Challenges Abolished. Challenges to the grand jury panel and to individual grand jurors are abolished. Objections to the grand jury panel and to individual grand jurors shall be made by motion to dismiss the indictment as hereafter provided.

Subd. 2. Motion to Dismiss Indictment. A motion to dismiss an indictment may be based upon any of the following grounds: that the grand jury was not selected, drawn or summoned in accordance with law; or that an individual juror is not legally qualified or that the juror's state of mind prevented the juror from acting impartially. An indictment shall not be dismissed on the ground that one or more of the grand jurors was not legally qualified if it appears from the jury's records that 12 or more jurors, after deducting the number not legally qualified, concurred in finding the indictment.

Comment—Rule 18

See comment following Rule 18.09.

Rule 18.03 Organization of Grand Jury

Subd. 1. Members; Quorum. A grand jury shall consist of not more than 23, nor

less than 16, persons, and shall not proceed to any business unless at least 16 members are present.

Subd. 2. Organization and Proceedings. The grand jury shall be organized and its proceedings shall be conducted as provided by law except as otherwise provided by these rules.

Subd. 3. Charge. After the grand jury is sworn, the court shall instruct it respecting its duties.

Comment—Rule 18

See comment following Rule 18.09.

Rule 18.04 Who May Be Present

Attorneys for the State, the witness under examination, qualified interpreters for witnesses handicapped in communication or for jurors with a sensory disability, and for the purpose of recording the evidence, a reporter or operator of a recording instrument may be present while the grand jury is in session, but no person other than the jurors and any qualified interpreters for any jurors with a sensory disability may be present while the grand jury is deliberating or voting. Upon order of court and a showing of necessity for the purpose of security, a designated peace officer may be present while a specified witness is testifying. If a witness before the grand jury so requests and has effectively waived immunity from self-incrimination or has been granted use immunity, the attorney for the witness may be present while the witness is testifying, provided the attorney is then and there available for that purpose or the attorney's presence can be secured without unreasonable delay in the grand jury proceedings. The attorney shall not be permitted to participate in the grand jury proceedings except to advise and consult with the witness while the witness is testifying.

Pursuant to an order of the court based upon a particularized showing of need, a witness under the age of 18 may be accompanied by a parent, guardian or other supportive person while that child witness is testifying before the grand jury. The parent, guardian or other supportive person shall not be permitted to participate in the grand jury proceedings and shall not be permitted to influence the content of the witness's testimony. In choosing the parent, guardian or other supportive person the court shall determine whether the parent, guardian or other supportive person is appropriate, including whether he or she may become a witness to the matter or may exert undue influence over the child witness. The court shall instruct the parent, guardian or other supportive person on their proper role in the grand jury proceedings.

Comment—Rule 18

See comment following Rule 18.09.

Rule 18.05 Record of Proceedings

Subd. 1. Verbatim Record. A verbatim record shall be made by a reporter or recording instrument of the evidence taken before the grand jury and of all statements

made and events occurring before the grand jury except during deliberations and voting of the grand jury. The required verbatim record shall not include the name of any grand juror. The record shall not be disclosed except to the court or prosecuting attorney or unless the court, upon motion by the defendant for good cause shown, or upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, orders disclosure of the record or designated portions thereof to the defendant or defense counsel.

Subd. 2. Transcript. Upon motion of the defendant with notice to the prosecuting attorney, the district court at any time before trial shall, subject to such protective order as may be granted under Rule 9.03, subd. 5, order that defense counsel may obtain a transcript or copy of: (1) any recorded testimony of the defendant before the grand jury in the case against the defendant; (2) the recorded testimony of any persons before the grand jury whom the prosecution intends to call as witnesses at the defendant's trial; or (3) the recorded testimony of any witness before the grand jury in the case against the defendant, provided that at the hearing on the motion, defense counsel makes an offer of proof showing that the defendant expects to call the witness at the trial and that the witness will give relevant testimony favorable to the defendant.

Comment—Rule 18

See comment following Rule 18.09.

Rule 18.06 Kind and Character of Evidence

Subd. 1. Admissibility of Evidence. An indictment shall be based on evidence that would be admissible at trial, with the following exceptions:

(1) Hearsay evidence offered only to lay the foundation for the admissibility of otherwise admissible evidence shall be admissible provided admissible foundation evidence is available and will be offered at the trial.

(2) A report or a copy of a report made by a person who is a physician, chemist, firearms identification expert, examiner of questioned documents, fingerprint technician, or an expert or technician in some comparable scientific or professional field, concerning the results of an examination, comparison, or test performed by the person in connection with the investigation of the case against the defendant may, when certified by such person as a report made by the person or as a true copy thereof, be received as evidence of the facts stated therein.

(3) Unauthenticated copies of official records shall be admissible provided the copies were made from the original records and properly authenticated copies will be available at the trial.

(4) Written sworn statements of the persons who claim to have title or an interest in property shall be admitted to prove ownership or that the property was obtained without the owner's consent, and written sworn statements of such persons or of experts shall be admitted to prove the value of the property, provided that admissible evidence to prove ownership, value, or nonconsent is available and will be presented at the trial.

(5) Written sworn statements of witnesses who for reasons of ill health or for other valid reasons are unable to testify in person shall be admitted, provided that such witnesses or otherwise admissible evidence will be available at the trial to prove the facts stated in the statements.

(6) Oral or written summaries made by investigating officers or other persons,

who are called as witnesses, of the contents of books, records, papers and other documents which they have examined but which are not produced at the hearing or previously submitted to defense counsel for examination, provided the documents and summaries would otherwise be admissible. It shall be permissible for a police officer in charge of the investigation to give an oral summary.

Subd. 2. Evidence Warranting Finding of Indictment. The grand jury may find an indictment when upon all of the evidence there is probable cause to believe that an offense has been committed and that the defendant committed it. Reception of inadmissible evidence shall not be grounds for dismissal of an indictment if there is sufficient admissible evidence to support the indictment.

Subd. 3. Presentments Abolished. The grand jury may not find or return a presentment.

Comment—Rule 18

See comment following Rule 18.09.

Rule 18.07 Finding and Return of Indictment

An indictment may be found only upon the concurrence of 12 or more jurors. When so found, it shall be signed by the foreperson, whether the foreperson be one of the 12 concurring or not, and delivered to a judge in open court. If 12 jurors shall not concur in finding an indictment, the foreperson shall so report in writing to the court forthwith, and any charges filed against the defendant for the offenses considered and upon which no indictment was returned shall be dismissed. The failure to find an indictment or the dismissal of the charge shall not prevent the case from again being submitted to a grand jury as often as the court shall direct

Comment—Rule 18

See comment following Rule 18.09.

Rule 18.08 Secrecy of Proceedings

Every grand juror and every qualified interpreter for a grand juror with a sensory disability present during deliberations or voting shall keep secret whatever that juror or any other juror has said during deliberations and how that juror or any other juror has voted. Disclosure of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to the prosecuting attorney for use in the performance of the prosecuting attorney's duties, and to the defendant or defense counsel pursuant to Rule 18.05 of this rule governing the record of the grand jury proceedings. Otherwise, no juror, attorney, interpreter, stenographer, reporter, operator of a recording device, typist who transcribes recorded testimony, clerk of court, law enforcement officer, parent, guardian or other supportive person who attended the grand jury in accordance with Rule 18.04 while a child testified, or court attaché may disclose matters occurring before the grand jury except when directed by the court preliminary to or in connection with a judicial proceeding. Unless the court directs otherwise, no person shall disclose the finding of an indictment until the defendant is in custody or appears before the court except when necessary for the issuance and execution of a summons or warrant,

provided, however, disclosure may be made by the prosecuting attorney by notice to the defendant or defense counsel of the indictment and the time of defendant's appearance in the district court, if in the discretion of the prosecuting attorney such notice is sufficient to insure defendant's appearance.

Comment—Rule 18

See comment following Rule 18.09.

Rule 18.09 Tenure and Excuse

A grand jury shall be drawn to serve for a specified period of time, not to exceed 12 months, designated by order of court. It shall not be discharged and its powers shall continue: (a) until the specified period of its service is completed or; (b) until its successor is drawn or; (c) until it has completed an investigation, already begun, of a particular offense, whichever is the later.

The tenure and powers of a grand jury are not affected by the beginning or expiration of a term of court.

At any time for cause shown the court may excuse a juror either temporarily or permanently, and in either event the court may impanel another person in place of the juror excused.

Comment—Rule 18

Rule 18.01, subd. 1 follows substantially the first sentence of F.R.Crim.P. 6 except that it requires that a grand jury shall be summoned not only whenever required by the public interest but also when requested by the county attorney. In this respect, it also changes Minn. Stat. § 628.42 (1971). Rule 18.01, subd. 1, permits more than one grand jury to be drawn or to serve at one time.

Under Rules 18.01, subd. 1 and 18.09 the grand jury shall be drawn and summoned and shall serve without regard to terms of court. This changes Minn. Stat. § 628.42, providing that the grand jury shall be drawn and summoned for a general term of court and requiring the order therefor to be entered 15 days before the term, and also changes Minn. Stat. § 628.46 (1971) which requires the venire for the grand jury panel to be issued 12 days before the first day of the term and summons to be served on the grand jurors 10 days before the beginning of the term. It also changes Minn. Stat. § 484.30 (1971) providing for a grand jury to be ordered for a special term of court.

Rule 18.01, subd. 2 continues statutory law (See Minn. Stat. §§ 593.13, 593.14 (1971).) For the selection of persons for the grand jury list from which the grand jury are to be drawn and summoned, except that, adopting the policy expressed in the Federal Jury Selection Act, 28 U.S.C. § 1861, and to meet constitutional requirements, Rule 18.01, subd. 2 requires that the persons on the grand jury list shall be selected at random from a fair cross section of the qualified residents of the county. The method by which this shall be done is left to the determination of the jury commission or judges making the selection of persons for the list. This changes the "key-man" selection process now followed in Ramsey, St. Louis and Hennepin Counties.

Rule 18.01, subd. 2 continues special provisions governing St. Louis County. Rule 18.01, subd. 2 continues existing practice provided by law (Minn. Stat. §§ 628.42, 628.45, 628.46 (1971)) for drawing the jurors from the grand jury list. The time and manner of summoning grand jurors shall be prescribed by rule or order of court.

Rule 18.02, subd. 1 abolishes the challenges to the grand jury panel and to individual jurors provided by Minn. Stat. § 628.52 (1971) and provides that objections to the panel and individual jurors shall be made solely by motion to dismiss the indictment. (See also Rule 17.06, subd. 2(1)).

The grounds for objections to the panel or to individual jurors enumerated in Minn. Stat. §§ 628.53, 628.54 (1971) are intended to be preserved by Rule 18.02, subd. 2 together with any other objections based on the grounds specified in Rule 18.02, subd. 2.

The effect of a dismissal of an indictment under Rule 18.02, subd. 2 is covered by Rule 17.06, subd. 4.

The second sentence of Rule 18.02, subd. 2 adopts F.R.Crim.P. 6(b)(2) that the indictment shall not be dismissed for disqualification of individual jurors if 12 or more other jurors concurred in the indictment.

Rule 18.03, subd. 1 continues present statutory law (Minn. Stat. § 628.41) as to the number of grand jury members and the quorum needed to conduct business.

Rule 18.03, subd. 2 continues present statutory law (Minn. Stat. §§ 628.56, 628.57 (1971)) for the organization and conduct of the proceedings of a grand jury except as otherwise provided by these rules. (See Rules 18.03, subd. 3 (charge), 18.04 (who may be present), 18.05, subd. 1 (record), 18.06 (kind and character of evidence).)

Rule 18.03, subd. 3 permits the court to instruct the jury under applicable rules and statutes without reading any particular statutes or rules.

Rule 18.04, specifying the persons who may be present before the grand jury, except when the jurors are deliberating or voting, is intended to take the place of those portions of Minn. Stat. §§ 628.63 and 630.18(3) (1971) which permit only the county attorney to be present at the request of the grand jury to examine the witnesses. The prosecuting attorney is entitled under the rule to be present whether the jury requests it or not.

Rule 18.04 also permits the presence of the following: qualified interpreters for those handicapped in communication as defined in Rule 5 and Minn. Stat. §§ 611.31-611.34 (1992); reporters or operators of a recording instrument to make the record required by Rule 18.05, subd. 1 (see F.R.Crim.P. 6(d)); a designated peace officer; and the attorney for a witness who has either effectively waived immunity from self-incrimination or been granted use immunity by the court.

Rule 18.04 also allows qualified interpreters for jurors with sensory disabilities to be present during grand jury proceedings including deliberations or voting. This is in accord with Minn. Stat. § 593.32 and Rule 809 of the Jury Management Rules in the General Rules of Practice for District Courts which prohibit exclusion from jury service for certain reasons including sensory disability. Further, this provision allows the court

to make reasonable accommodation for such jurors under the Americans with Disabilities Act. 42 U.S.C. § 12101 et seq.

Rule 18.05, subd. 1, providing for a verbatim record of all statements made and events occurring before the grand jury except during deliberations and voting, supercedes that portion of Minn. Stat. § 628.57 (1971) which provided that the minutes of the evidence taken before the grand jury shall not be preserved. (Minn. Stat. §§ 628.65, 628.66 (1971) are not affected.) This rule as amended is similar to the special rule of practice for the First Judicial District which was upheld by the Supreme Court in State v. Hejl, 315 N.W.2d 592 (Minn.1982) as being consistent with the original language of Rule 18.05. The purpose of Rule 18.05 as amended is to assure that everything said or occurring before the grand jury will be recorded except during deliberations and voting. This would include any statements made by the prosecuting attorney to the grand jury whether or not any witnesses are present. However, the names of the grand jurors are not to be recorded. Of course, under Rule 18.04 only grand jury members may be present during deliberations and voting.

Under Rule 18.05, subd. 1, the record may be disclosed to the court or to the prosecuting attorney, and to the defendant for good cause (This would include a "particularized need." Dennis v. United States, 384 U.S. 855, 869-870 (1966).) or on a showing that grounds exist for a motion to dismiss the indictment because of occurrences before the grand jury. In addition, the defendant, under Rule 9.01, subd. 1, may obtain from the prosecuting attorney any portions of the grand jury proceedings already transcribed and possessed by the prosecuting attorney.

Rule 18.05, subd. 2, supplementing the discovery rules (Rule 9.01, subd. 1), permits the defendant to obtain a transcript of the testimony of grand jury witnesses, subject to protective orders under Rule 9.03, subd. 5. (See ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(iii) (Approved Draft, 1970).) This rule does not preclude the court from ordering that the defendant be supplied with such a transcript during the trial, upon a showing of good cause.

Rule 18.06, subd. 1 supersedes Minn. Stat. § 628.59 (1971).

Rule 18.06, subd. 2, providing that an indictment may be found upon probable cause changes Minn. Stat. § 628.03 (1971) and that part of § 628.02 which is inconsistent with the rule.

Rule 18.06, subd. 3, abolishes the presentment provided by Minn. Stat.§§ 628.03, 628.04 (1971).

Rule 18.07 adopts the substance of Minn. Stat. § 628.08 (1971) except that the indictment shall bear only the signature of the foreperson instead of the foreperson's signed endorsement that it is a true bill. The requirement of Rule 18.07 that an indictment be "delivered to a judge in open court" is not inconsistent with the general requirement of Rule 18.08 that no person shall disclose the finding of an indictment until the defendant is in custody or appears before the court. Delivery of the indictment does not mean that it must be read or disclosed in court. Also under Rule 33.04 the prosecuting attorney may request the court to delay the filing of the indictment until the arrest of the defendant involved.

The provision that if an indictment is not voted, the foreperson shall so report to the court forthwith in writing (See F.R.Crim.P. 6(f).) was not contained in Minn. Stat. § 628.08 (Repealed, 1979 c. 233, § 42).

The provisions of the first sentence of Rule 18.08 for secrecy on the part of the grand jurors is taken from Minn. Stat. § 628.64 (1971). Additionally it provides that any interpreters for grand jurors with a sensory disability shall have that same obligation of secrecy. As to the confidentiality obligation of interpreters generally see Canon 5 of the Code of Professional Responsibility for Interpreters in the Minnesota State Court System.

That part of the second sentence of Rule 18.08 providing for disclosures to the prosecuting attorney for use in the performance of the prosecuting attorney's duties comes from F.R.Crim.P. 6(e). The provision in the second sentence for disclosure to the defendant is in accord with Rule 18.05. The third sentence of Rule 18.08 imposing secrecy on the persons named--except as permitted by Rules 18.08 and 18.05--or except when ordered by the court in connection with a judicial proceeding, is taken from F.R.Crim.P. 6(e).

The first part of the last sentence of Rule 18.08 forbidding disclosure of an indictment until the defendant is in custody or appears in court except when necessary for the issuance of a warrant or summons (See Rule 19.01) is taken from F.R.Crim.P. 6(e); and the following proviso adopts the substance of the last sentence of Minn. Stat. § 628.68 (1971). The rule, however, leaves it to the discretion of the prosecuting attorney to determine whether to notify the defendant or defense counsel of the indictment without the issuance of a warrant or summons.

Rule 18.09 making the grand jury session independent of the terms of court adopts the substance of F.R.Crim.P. 6(g) and takes the place of Minn. Stat. § 628.58 (1971). (See also Rule 18.01, subd. 1.)

The object of Rules 18.09 and 18.01, subd. 1 is that a grand jury shall always be available, without regard to terms of court, to be summoned into session and convened when required under Rule 18.01 or otherwise.

That portion of Rule 18.09 authorizing the court to excuse a grand juror for good cause is taken from F.R.Crim.P. 6(g), and enlarges the power of the court under Minn. Stat. § 628.49 (1971). The court may excuse grand jurors for the reasons specified in § 628.49 and upon other grounds showing good cause.

Rule 19. Warrant or Summons Upon Indictment; Appearance Before District Court

Rule 19.01 Issuance

When an indictment is filed, a warrant for the arrest of each defendant named in the indictment shall be issued by the court upon the request of the prosecuting attorney, except that a summons instead of a warrant shall be issued upon the request of the prosecuting attorney or by direction of the court or if the defendant is a corporation.

If the defendant is in custody, the court may order the officer having the defendant in custody to bring the defendant before the court at a specified time and date.

More than one warrant or summons may be issued for the same defendant. If a defendant other than a corporation for whom a summons has been issued fails to appear in response to a summons, a warrant shall be issued.

Comment—Rule 19

See comment following Rule 19.06.

Rule 19.02 Form

Subd. 1. Warrant. The warrant shall be signed by the judge; shall contain the name of the defendant or, if that name is unknown, any name or description by which the defendant can be identified with reasonable certainty; shall describe the offense charged in the indictment; and shall command that the defendant be arrested and brought before the court. The amount of bail and other conditions of release may be set by the court and endorsed on the warrant.

Subd. 2. Summons. The summons shall be signed by the judge and shall summon the defendant to appear before the court at a specified time and place to answer to the indictment. A copy of the indictment shall be attached to the summons.

Comment—Rule 19

See comment following Rule 19.06.

Rule 19.03 Execution or Service; Certification of Execution or Service

Subd. 1. By Whom. The warrant may be executed by any officer authorized by law. The summons may be served by any officer authorized to execute a warrant, and if served by mail, it may be served by the clerk.

Subd. 2. Territorial Limits. The warrant may be executed or the summons may be served at any place within the state except where prohibited by law.

Subd. 3. Manner. The warrant shall be executed or summons served in the manner provided by Rule 3.03, subd. 3.

Subd. 4. Certification. The execution of a warrant or the service of a summons shall be certified as provided by Rule 3.03, subd. 4.

Subd. 5. Unexecuted Warrants. At the request of the prosecuting attorney made at any time while the indictment is pending, a warrant returned unexecuted or a summons returned unserved or a duplicate thereof may be delivered to any authorized officer or person for execution or service.

Comment—Rule 19

See comment following Rule 19.06.

Rule 19.04 Appearance of Defendant Before Court

Subd. 1. Appearance. The defendant shall be taken promptly before the district court which issued the warrant.

Subd. 2. Statement to Defendant. A defendant appearing initially before the district court under a warrant of arrest or in response to a summons, shall be advised of the charges. If the defendant has not received a copy of the indictment, the defendant shall be provided with a copy.

The court shall also advise the defendant substantially as required by Rule 5.01.

Subd. 3. Appointment of Counsel. If the defendant is not represented by counsel and is financially unable to afford counsel, the court shall appoint counsel for the defendant.

Subd. 4. Date for Arraignment. Upon defendant's initial appearance before the district court, the defendant may be arraigned, upon the defendant's request and with the consent of the court. If the defendant is not arraigned at the initial appearance, a date shall be set for the arraignment upon the indictment not more than seven (7) days from the date of such initial appearance. The time for appearance may be extended by the district court for good cause. Upon defendant's arraignment, whether at the initial appearance or at some later appearance prior to the Omnibus Hearing, the defendant may only enter a plea of guilty. A defendant who does not wish to plead guilty shall not be called upon to enter any other plea and the arraignment shall be continued until the Omnibus Hearing when pursuant to Rule 11.10 the defendant shall plead to the indictment or be given additional time within which to plead.

Subd. 5. Omnibus Hearing Date and Procedure. If upon arraignment, the defendant does not plead guilty, a date shall be fixed, not more than seven (7) days from the date of the arraignment, unless the court for good cause related to the particular case, upon motion of the prosecuting attorney or the defendant or upon the court's initiative, extends the time, when an Omnibus Hearing shall be held in accordance with Rule 11.

Subd. 6. Notice by Prosecuting Attorney.

(1) Notice of Evidence and Identification Procedures. When the prosecution has (1) any evidence against the defendant obtained as a result of a search, search and seizure, wiretapping, or any form of electronic or mechanical eavesdropping, (2) any confessions, admissions or statements in the nature of confessions made by the defendant, (3) any evidence against the defendant discovered as the result of confessions, admissions or statements in the nature of confessions made by the defendant, or (4) when in the investigation of the case against the defendant, any identification procedures were followed, including but not limited to lineups or other observations of the defendant and the exhibition of photographs of the defendant or of any other persons, the prosecuting attorney, on or before the date set for defendant's arraignment, shall notify the defendant or defense counsel in writing of such evidence and identification procedures.

(2) Notice of Additional Offenses. The prosecuting attorneys shall notify the defendant or defense counsel in writing of any additional offenses the evidence of which may be offered at the trial under any exceptions to the general exclusionary rule. The notice shall be given at the Omnibus Hearing under Rule 11 or as soon thereafter as the offense becomes known to the prosecuting attorney. Such additional offenses shall be described with sufficient particularity to enable the defendant to prepare for trial. The

notice need not include offenses for which the defendant has been previously prosecuted, or those that may be offered in rebuttal of the defendant's character witnesses or as a part of the occurrence or episode out of which the offense charged in the indictment arose.

(3) Notice of Intent to Seek Aggravated Sentence. At least seven days prior to the Omnibus Hearing, or at such later time if permitted by the court upon good cause shown and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

Subd. 7. Discovery. Before the date set for the Omnibus Hearing the prosecution and defendant shall complete the discovery that is required by Rules 9.01, subd. 1 and 9.02, subd. 1 to be made without the necessity of an order of court.

Comment—Rule 19

See comment following Rule 19.06.

Rule 19.05 Bail or Conditions of Release

Upon the defendant's initial appearance before the district court following an indictment, the court may, in accordance with Rule 6 set bail or other conditions of release or may continue or modify bail or conditions of release previously ordered.

Comment—Rule 19

See comment following Rule 19.06.

Rule 19.06 Record

A verbatim record shall be made of the proceedings before the court upon defendant's initial appearance and arraignment and of the Omnibus Hearing.

Comment—Rule 19

Rule 19 relating to the warrant or summons on an indictment and the subsequent procedures parallels for the most part Rules 3, 4, 5, 7, 8, 11 governing the warrant or summons on a complaint and the procedures thereafter followed, all of which lead up to the Omnibus Hearing under Rule 11. The necessary differences between the two procedures under an indictment and a complaint are reflected in Rule 19.

Rule 19.01 provides for the issuance of a warrant of arrest or summons upon an indictment when requested by the prosecuting attorney, and a summons shall be issued when directed by the court. (See F.R.Crim.P. 9(a).) (Rule 19.01 takes the place of Minn. Stat. §§ 630.02, 630.03 (1971) providing for bench warrants.) (See also Rule 18.08 providing for notice to the defendant or defense counsel at the discretion of the prosecuting attorney.)

That part of Rule 19.01 providing for the issuance of a summons for a corporation takes the place of Minn. Stat. § 630.15 (1971).

The provision of Rule 19.01 that a defendant in custody may be ordered by the court to be brought before the court at a specified time and place is taken from Minn. Stat. § 630.01 (1971).

Rule 19.01 permits more than one warrant or summons to be issued upon the same indictment as for example, for codefendants. (See F.R.Crim.P. 9(a).)

If a defendant other than a corporation does not respond to a summons a warrant shall issue. (See F.R.Crim.P. 9(a).) If a corporation does not respond to a summons, the court may proceed as provided in Rule 14.02, subd. 4.

Rule 19.02, subd. 1 provides that the warrant shall be signed by a judge of the district court. The form of the warrant follows substantially that prescribed for a warrant upon a complaint by Rule 3.02, subd. 1 except that the indictment warrant directs the defendant to be brought before the district court, and Rule 19.04, subd. 1 requires that this be done promptly.

The amount of bail and other conditions of release may be set by the district court (See Rule 6.02) and endorsed on the warrant. (See F.R.Crim.P. 9(b)(1) and Minn. Stat. § 630.05 (1971).) (See also Rule 19.05).

The form of summons prescribed by Rule 19.02, subd. 2 is substantially the same as that prescribed by Rule 3.02, subd. 3 for a summons on a complaint.

Rule 19.03 governing execution or service of a warrant or summons upon an indictment and proof of execution or service follows substantially Rule 3.03 governing the similar procedures relating to a warrant or summons on a complaint.

Upon the defendant's first appearance before the district court under Rule 19.04, the defendant shall be advised of the charges; provided with a copy of the indictment; given the advice required by Rule 5.01; counsel shall be appointed for a defendant who is unrepresented and unable to afford counsel (Rule 19.04, subd. 3); the bail or conditions of release set, continued, or modified in accordance with the provisions of Rule 6.02 (Rule 19.05); and a date shall be fixed for arraignment (Rule 13), which shall be held not more than 7 days after the appearance in district court, unless the time is extended for good cause. (Rule 19.04, subd. 5). Instead of having a separate arraignment, Rule 19.04, subd. 4, permits the arraignment and initial appearance to be consolidated. This is possible only if requested by the defendant and agreed to by the court. Ordinarily, the Omnibus Hearing would then be held within seven (7) days after the consolidated initial appearance and arraignment under Rule 19.04, subd. 5, but that rule also permits the court to extend that time for good cause.

On or before the date of the arraignment the prosecuting attorney shall give the Rasmussen notice required by Rule 19.04, subd. 6(1). (See Rule 7.01 and Comments to Rule 7.01).

Rule 19.04, subd. 6(3), which establishes the notice requirements for a prosecuting attorney seeking an aggravated sentence in proceedings prosecuted by indictment, parallels Rule 7.03, which establishes those requirements for proceedings prosecuted by complaint. See the comments to that other rule. Also see Rule 1.04(d), which defines "aggravated sentence," and the comments to that rule.

Upon the date fixed for arraignment, the defendant shall be arraigned as provided by Rule 13. If the defendant does not plead guilty, a date shall be fixed for the Omnibus Hearing under Rule 11, which shall be held not more than 7 days from the date of the arraignment unless extended for good cause. (Rule 19.04, subd. 4 and subd. 5).

Between defendant's first appearance in the district court and the Omnibus Hearing, the prosecution and defendant shall complete the discovery procedures required by Rules 9.01, subd. 1; 9.02, subd. 1 (Rule 19.04, subd. 7).

The parties shall serve their motions under Rule 10 at least 3 days before the Omnibus Hearing (Rule 10.04) (including motions to suppress based on the Rasmussen notice given under Rule 19.04, subd. 6(1)). (See also comments to Rule 11.03.)

At or before the Omnibus Hearing the prosecution shall give the Spreigl notice required by Rule 19.04, subd. 6(4). (See Rule 7.02 and comments to Rule 7.02.)

The Omnibus Hearing shall be held in the district court in accordance with the provisions of Rule 11. (See comments to Rule 11.) If at the Omnibus Hearing the defendant wishes to challenge the sufficiency of the evidence heard by the grand jury to support the indictment that challenge is governed by Rule 17.06, subd. 2(1)(a) and Rule 18.06, subds. 1 and 2. The provision in Rule 11.03 concerning a motion that there is an insufficient showing of probable cause applies only to complaints and not to indictments.

By Rule 19.06 a verbatim record shall be made of the defendant's first appearance before the district court, the arraignment, and the Omnibus Hearing.

Rule 20. Proceedings For Mentally Ill or Mentally Deficient

Rule 20.01 Competency to Proceed

Subd. 1. Competency to Proceed Defined. A defendant shall not be permitted to waive counsel who lacks sufficient ability to knowingly, voluntarily, and intelligently waive the constitutional right to counsel, to appreciate the consequences of the decision to proceed without representation by counsel, to comprehend the nature of the charge and proceedings, the range of applicable punishments, and any additional matters essential to a general understanding of the case. The court may not proceed under this rule before a lawyer consults with the defendant and the lawyer has an opportunity to be heard by the court. A defendant shall not be permitted to enter a plea or be tried or sentenced for any offense if the defendant:

(1) lacks sufficient ability to consult with a reasonable degree of rational understanding with defense counsel; or

(2) is mentally ill or mentally deficient so as to be incapable of understanding the proceedings or participating in the defense.

Subd. 2. Proceedings. If during the pending proceedings, the prosecuting attorney, defense counsel or the court has reason to doubt the competency of the defendant, then the prosecuting attorney or defense counsel by motion or the court on its initiative shall raise that issue. Any such motion may be brought over the objection of the defendant. The motion shall set forth the facts constituting the basis for the motion,

but defense counsel shall not divulge communications in violation of the attorney-client privilege. The bringing of the motion by defense counsel does not waive the attorney-client privilege. If the court in which a criminal case is pending determines upon motion of the prosecuting attorney or defense counsel or upon initiative of the court that there is reason to doubt the defendant's competency as defined by this rule, the court shall suspend the criminal proceedings and shall proceed as follows:

(1) Misdemeanors. If the charge is a misdemeanor, the court having trial jurisdiction shall either proceed according to this rule, or cause civil commitment proceedings to be instituted against the defendant, or unless contrary to the public interest, dismiss the case.

(2) Probable Cause--Felony or Gross Misdemeanor. In the case of a felony or gross misdemeanor, unless the issue of probable cause has previously been determined, the district court, upon motion, before proceeding further shall determine whether there is sufficient probable cause stated on the face of the complaint. If the court determines that the complaint does not state sufficient probable cause to believe the defendant committed the offense charged, the charges against the defendant shall be dismissed.

(3) *Medical Examination.* The court shall appoint at least one examiner as defined in the Minnesota Commitment Act of 1982, Minnesota Statutes, chapter 253B, or successor statute to examine the defendant and to report to the court on the defendant's mental condition.

If the defendant is otherwise entitled to release, confinement for the examination may not be ordered if the examination can be done adequately on an outpatient basis. The court may make appearance for the outpatient examination a condition of the defendant's release. If the examination cannot be adequately done on an outpatient basis or if the defendant is not otherwise entitled to be released, the court may order the defendant confined in a state mental hospital or other suitable hospital or facility for the purpose of such examination for a specified period not to exceed 60 days. If the defendant or prosecution has retained a qualified psychiatrist or clinical psychologist or physician experienced in the field of mental illness, the court on request of the defendant or prosecuting attorney shall direct that such psychiatrist or psychologist or physician be permitted to observe the examination and to also examine the defendant. Both the examiner appointed by the court and any examiner retained by the defense or prosecuting attorney may obtain and review the report of any prior examination conducted under this rule. The court shall further direct that if any of the mental-health professionals appointed to examine the defendant concludes that the defendant presents an imminent risk of serious danger to another person, is imminently suicidal, or otherwise needs emergency intervention, the mental-health professional shall promptly notify the prosecuting attorney, defense counsel, and the court.

(4) Report of Examination. At the conclusion of the examination, a written report of the examination shall be forwarded to the judge who ordered the examination, and the judge shall cause copies of the report to be delivered forthwith to the prosecuting attorney and to defense counsel. The contents of the report shall not be otherwise disclosed until the hearing on the defendant's competency. The report of the examination shall include without limitation:

(1) A diagnosis of the mental condition of the defendant.

(2) If the defendant is mentally ill or mentally deficient, an opinion as to: (a) the defendant's capacity to understand the criminal proceedings and to participate in the defense; (b) whether the defendant presents an imminent risk of serious danger to another person, is imminently suicidal, or otherwise needs emergency intervention; (c) the treatment required, if any, for the defendant to attain or maintain competence with an

explanation of the appropriate treatment alternatives by order of choice, including the extent to which the defendant can be treated without being committed to an institution and the reasons for rejecting such treatment if institutionalization is recommended; and (d) whether there is a substantial probability that with treatment or otherwise the defendant will ever attain the competency to proceed, and if so, in approximately what period of time, and the availability of the various types of acceptable treatment in the local geographical area, specifying the agencies or settings in which the treatment might be obtained and whether it would be available to an outpatient.

(3) A statement of the factual basis upon which the diagnosis and opinion are based.

(4) If the examination could not be conducted by reason of the defendant's unwillingness to participate therein, a statement to that effect with an opinion, if possible, as to whether the defendant's unwillingness was the result of mental illness or deficiency.

Subd. 3. Hearing and Determination of Competency.

(1) Request for Hearing. If either party files written objections to the report within ten (10) days after the receipt of a copy thereof, the court, upon notice to the parties, shall hold a hearing on the issue of the defendant's competency to proceed.

(2) Going Forward with Evidence. If the defense moved for the examination, the defense shall go forward first with evidence at the hearing. If the examination was on motion of the prosecuting attorney or on the initiative of the court, the prosecuting attorney shall go forward first with evidence unless the court otherwise directs.

(3) Report and Evidence. At the hearing, evidence as to the defendant's mental condition may be admitted, including the report of the person who examined the defendant at the direction of the court. The person who prepared the report or any individual designated by that person as a source of information for preparation of the report, other than the defendant or defense counsel, is considered the court's witness and may be called and cross-examined as such by either party.

(4) Defense Counsel as Witness. To the extent that doing so does not divulge communications in violation of the attorney-client privilege, defense counsel may relate to the court, subject to examination by the prosecuting attorney, personal observations of and conversations with the defendant. Those disclosures do not automatically disqualify defense counsel from continuing to represent the defendant. The court may inquire of defense counsel concerning the attorney-client relationship and the defendant's ability to communicate effectively with defense counsel. However, the court may not require defense counsel to divulge communications in violation of the attorney-client privilege. The prosecuting attorney may not cross-examine defense counsel responding to the court's inquiry.

(5) Determination Without Hearing. If neither the prosecution nor the defense files written objections to the report within the ten-day period, the court without a hearing may determine the defendant's competency to proceed upon the basis of the report.

(6) Decision and Sufficiency of Evidence. If upon consideration of the report and the evidence received at any hearing, the court finds by the greater weight of the evidence that the defendant is competent, the court shall enter an order finding that the defendant is competent. Otherwise, the court shall enter an order finding that the defendant is incompetent.

Subd. 4. Effect of Finding on Issue of Competency to Proceed.

(1) Finding of Competency. If the court determines that the defendant is competent to proceed, the criminal proceedings against the defendant shall be resumed.

(2) Finding of Incompetency. If the charge against the defendant is a misdemeanor and the court determines that the defendant is incompetent to proceed, the charge shall be dismissed. If the charge against the defendant is a gross misdemeanor or felony and the court determines that the defendant is incompetent to proceed, the criminal proceedings against the defendant shall be further suspended except as provided by Rule 20.01, subd. 6.

(a) Finding of Mental Illness. If the court determines that the defendant is mentally ill so as to be incapable of understanding the criminal proceedings or participating in the defense, and the defendant is under civil commitment as mentally ill, the court shall order that the commitment be continued, and if not under commitment, the court shall cause civil commitment proceedings to be instituted against the defendant. The commitment or continuing commitment shall be subject to the supervision of the trial court as provided by Rule 20.01, subd. 5.

(b) Finding of Mental Deficiency. If the court finds the defendant to be mentally deficient so as to be incapable of understanding the criminal proceedings or participating in the defense, and the defendant is under commitment as mentally deficient to the guardianship of the commissioner of public welfare, the court shall order the defendant remanded to the care and custody of the commissioner, and if not under commitment, the court shall cause civil commitment proceedings to be instituted against the defendant. The commitment or continuing commitment shall be subject to the supervision of the trial court as provided by Rule 20.01, subd. 5.

(c) Appeal. Either party shall have the right of appeal to the Court of Appeals from a determination of the probate court upon the civil commitment proceedings. The appeal shall be on the record only pursuant to Rule 28. In all civil commitment proceedings instituted under this rule, a verbatim record of the proceedings shall be made.

Subd. 5. Continuing Supervision by the Court in Felony and Gross Misdemeanor Cases. The head of the institution to which the defendant is committed under civil commitment proceedings, or if the defendant is not committed to an institution, the officer or other person charged with the defendant's supervision or to whom the defendant has been committed, shall report periodically to the trial court, at such times as the court shall provide, on the defendant's mental condition with an opinion as to the defendant's competency to proceed. The reports shall be made not less than once every six months unless otherwise ordered. Copies of the reports shall be furnished to the prosecuting attorney and to defense counsel.

When the court on application of the prosecuting attorney, defense counsel, the defendant, or the person having supervision over the defendant, or on the court's initiative, determines, after a hearing with notice to the parties, that the defendant is competent to proceed, the criminal proceedings against the defendant shall be resumed. Unless the criminal charges against the defendant have been dismissed as provided by Rule 20.01, subd. 6, the trial court and the prosecuting attorney shall be notified of any proposed institutional transfer, partial institutionalization status, and any proposed termination, discharge, or provisional discharge of the civil commitment. The prosecuting attorney shall have the right to participate as a party in any proceedings concerning such proposed changes in the defendant's civil commitment or status.

Subd. 6. Dismissal of Criminal Proceedings.

(1) Felonies. Except when the defendant is charged with murder, the criminal proceedings shall be dismissed upon the expiration of three years from the date of the finding of the defendant's incompetency to proceed unless the prosecuting attorney, before the expiration of the three-year period, files a written notice of intention to prosecute the defendant when the defendant has been restored to competency.

(2) Gross Misdemeanors. The criminal proceedings shall be dismissed 30 days after the date of the finding of the defendant's incompetency to proceed unless by that date the prosecuting attorney files a written notice of intention to prosecute the defendant when the defendant has been restored to competency. If such a notice has been filed, the criminal proceedings shall be dismissed when the defendant would be entitled under these rules to custody credit of at least one year if convicted in the criminal proceedings.

Subd. 7. Determination of Legal Issues Not Requiring Defendant's Participation. The fact that the defendant is incompetent to proceed shall not preclude defense counsel from making any legal objection or defense which is susceptible of fair determination before trial without the personal participation of the defendant.

Subd. 8. Admissibility of Defendant's Statements. When a defendant is examined under this rule, any statement made by the defendant for the purpose of the examination and any evidence derived from the examination shall be admissible in evidence at the proceedings to determine whether the defendant is competent to proceed.

Subd. 9. Credit for Time Spent in Confinement. If the court orders criminal proceedings resumed on a finding that defendant is competent to proceed, and the defendant is convicted of the charge, the time the defendant has spent confined to a hospital or other facility under this rule shall be credited upon any jail or prison sentence imposed.

Comment—Rule 20

See comment following Rule 20.03.

Rule 20.02 Medical Examination of Defendant Upon Defense of Mental Deficiency or Mental Illness

Subd. 1. Authority of Court to Order Examination. The court having trial jurisdiction over the offense charged may order a mental examination of the defendant when the defense has notified the prosecuting attorney pursuant to Rule 9.02, subd. 1(3)(a) of an intention to assert a defense of mental illness or deficiency, when the defendant in a misdemeanor case pleads not guilty by reason of mental illness or mental deficiency, or when at the trial of the case, the defendant offers evidence of such mental condition.

Subd. 2. Examination of the Defendant. If the court orders a mental examination of the defendant, it shall appoint at least one examiner as defined in the Minnesota Commitment Act of 1982, Minn. Stat. Ch. 253B, or successor statute to examine the defendant and report upon the defendant's mental condition. For the purpose of the examination, the court, upon a special showing of need therefor, may order the defendant to be confined to a hospital or other suitable facility for a specified period not to exceed 60 days. If the defendant or prosecution has retained an examiner as defined in the Minnesota Commitment Act of 1982, Minn. Stat. Ch. 253B, or successor statute, the

court on request of the defendant or prosecuting attorney shall direct that such examiner be permitted to observe the mental examination and to conduct a mental examination of the defendant also.

Subd. 3. Refusal of Defendant to be Examined. If the defendant does not participate in the examination so that the examiner is unable to make an adequate report to the court, the court may prohibit the defendant from introducing evidence of the defendant's mental condition, may strike any such evidence previously introduced, may permit any other party to introduce evidence of defendant's refusal to cooperate and to comment thereon to the trier of the facts, and may make any such other ruling as it deems just.

Subd. 4. Report of Examination. At the conclusion of the examination, a written report of the examination shall be forwarded to the judge who ordered the examination, and the court shall cause copies of the report to be delivered forthwith to the prosecuting attorney, and to defense counsel. The contents of the report shall not otherwise be disclosed except as hereafter provided by this rule. The report of the examination shall contain:

(1) A diagnosis of the defendant's mental condition as requested by the court;
(2) If so directed by the court an opinion as to whether, because of mental illness or deficiency, the defendant at the time of the commission of the offense charged was laboring under such a defect of reason as not to know the nature of the act constituting the offense with which defendant is charged or that it was wrong;
(3) Any opinion requested by the court that is based on the examiner's diagnosis;
(4) A statement of the factual basis upon which the diagnosis and any opinion are based.

If the examination cannot be conducted by reason of the defendant's unwillingness to participate, the report shall so state and shall include, if possible, an opinion as to whether the unwillingness of the defendant was the result of mental illness or deficiency.

Subd. 5. Admissibility of Evidence at Trial. No evidence derived from the examination shall be received against the defendant unless the defendant has previously made his or her mental condition an issue in the case. If the defendant's mental condition is an issue, any party may call the person who examined the defendant at the direction of the court to testify as a witness at the trial and that person shall be subject to cross-examination by any other party. The report or portions thereof may be received in evidence to impeach the testimony of the person making it.

Subd. 6. Admissibility of Defendant's Statements. When a defendant is examined under Rule 20.01 or Rule 20.02, or both, the admissibility at trial of any statements made by the defendant for the purposes of the examination and any evidence obtained as a result of such statements shall be determined by the following rules:

(1) Notice by Defendant of Sole Defense of Mental Condition. If a defendant notifies the prosecuting attorney under Rule 9.02, subd. 1(3)(a) of an intention to rely solely on the defense of mental illness or deficiency or if the defendant in a misdemeanor case relies solely on the plea of not guilty by reason of mental illness or mental deficiency pursuant to Rule 14.01(c), statements made by the defendant for the purpose

of the mental examination and evidence obtained as a result of the statements shall be admissible at the trial upon that issue.

(2) Separate Trial of Defenses. If a defendant notifies the prosecuting attorney under Rule 9.02, subd. 1(3)(a) of an intention to rely on the defense of mental illness or mental deficiency together with a defense of not guilty, or if the defendant in a misdemeanor case pleads both not guilty and not guilty by reason of mental illness or mental deficiency, there shall be a separation of the two defenses with a sequential order of proof before the court or jury in a continuous trial in which the defense of not guilty shall be heard and determined first, and then the defense of the defendant's mental illness or deficiency.

(3) Effect of Separate Trial. If the defendant relies on the two defenses, the statements made by the defendant for the purpose of the mental examination and any evidence obtained as a result of such statements shall be admissible against the defendant only at that stage of the trial relating to the defense of mental illness or mental deficiency.

(4) Procedure Upon Separated Trial of Defenses.

(a) Instructions to Jury. When the two defenses are separated for trial under this rule, the jury shall be informed at the commencement of the trial that the two defenses have been interposed; that the defense of not guilty will be tried first and then the defense of mental illness or mental deficiency; that if the jury finds that the elements of the offense charged have not been proved, the defendant will be acquitted; that if the jury finds the elements of the offense have been proved, the defense of mental illness or deficiency will then be tried and determined by the jury.

(b) Proof of Elements of Offense--Effect. Upon the trial of the defense of not guilty the jury, or the court, if a jury is waived, shall determine whether the elements of the offense charged have been proved beyond a reasonable doubt.

If the court or jury determines that the elements of the offense have not been proved beyond a reasonable doubt, a judgment of acquittal shall be entered.

If the court or jury determines that the elements of the offense have been proved beyond a reasonable doubt, the defense of mental illness or mental deficiency shall then be tried and determined by the jury, or by the court, if a jury is waived, and based upon that determination the jury or court shall render a verdict or make a finding: (1) of not guilty by reason of mental illness; or (2) of not guilty by reason of mental deficiency; or (3) of guilty. The court shall enter judgment accordingly. The defendant shall have the burden of proving the defense of mental illness or mental deficiency by a preponderance of the evidence.

Subd. 7. Simultaneous Examinations. The court may order that the examination for competency to proceed under Rule 20.01, an examination for civil commitment as mentally ill or mentally deficient under the Minnesota Commitment Act of 1982, Minn. Stat. Ch. 253B, or successor statute, and the examination authorized by Rule 20.02 be conducted simultaneously.

Subd. 8. Legal Effect of Finding of Not Guilty by Reason of Mental Illness or Deficiency.

(1) Mental Illness. When a defendant is found not guilty by reason of mental illness, and the defendant is under civil commitment as mentally ill, the court shall order that the commitment be continued, and if not under commitment, the court shall cause civil commitment proceedings to be instituted against the defendant and that the defendant be detained in a state hospital or other facility pending completion of the proceedings. The commitment or continuing commitment in felony and gross

misdemeanor cases shall be subject to the supervision of the trial court as provided by Rule 20.02, subd. 8(4).

(2) Mental Deficiency. When a defendant is found not guilty by reason of mental deficiency and the defendant is under commitment to the guardianship of the commissioner of public welfare, the court shall order the defendant remanded to the care and custody of the commissioner, and if not under such commitment, the court shall cause civil commitment proceedings to be instituted against the defendant. The commitment or continuing commitment in felony and gross misdemeanor cases shall be subject to the supervision of the trial court as provided by Rule 20.02, subd. 8(4).

(3) Appeal. Either party shall have the right to appeal to the Court of Appeals from a determination of the court upon the civil commitment proceedings. The appeal shall be taken on the record only pursuant to Rule 28. In all commitment proceedings instituted under this rule, a verbatim record of the proceedings shall be made.

(4) Continuing Supervision. In felony and gross misdemeanor cases only, the trial court and the prosecuting attorney shall be notified of any proposed institutional transfer, partial hospitalization status, and any proposed termination, discharge, or provisional discharge of the civil commitment. The prosecuting attorney shall have the right to participate as a party in any proceedings concerning such proposed changes in the defendant's civil commitment or status.

Comment—Rule 20

See comment following Rule 20.03.

Rule 20.03 Disclosure of Reports and Records of Defendant's Mental Examinations

Subd. 1. Order for Disclosure. If a defendant notifies the prosecuting attorney under Rule 9.02, subd. 1(3)(a) of an intention to rely on the defense of mental illness or mental deficiency, the trial court, on motion of the prosecuting attorney and notice to defense counsel may order the defendant to furnish either to the court or to the prosecuting attorney copies of all medical reports and hospital and medical records previously or thereafter made concerning the mental condition of the defendant and relevant to the issue of the defense of mental illness or mental deficiency. If the copies of the reports and records are furnished to the court, the court shall inspect them to determine their relevancy. If the court determines they are relevant, they shall be delivered to the prosecuting attorney. Otherwise, they shall be returned to the defendant.

If the defendant is unable to comply with the court order, a subpoena duces tecum may be issued under Rule 22.

Subd. 2. Use of Reports and Records. If an order for disclosure of reports and records under Rule 20.03, subd. 1 is entered and copies thereof are furnished to the prosecuting attorney, the reports and records and any evidence obtained therefrom may be admitted in evidence only upon the issue of the defense of mental illness or mental deficiency when that issue is the sole defense or when it is tried as provided by Rule 20.02, subd. 6(4).

Comment—Rule 20

Rule 20 prescribes the detailed procedures to be followed when it appears that a

defendant may be mentally incompetent to stand trial or when the defendant interposes a defense of mental irresponsibility. The rule fills in the omissions in existing procedures (Minn. Stat. §§ 611.026, 631.18, 631.19 (1971)) and attempts to meet the constitutional equal protection and due process requirements established by Jackson v. Indiana, 406 U.S. 715 (1972), McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972), Humphrey v. Cady, 405 U.S. 504 (1972), and Pate v. Robinson, 383 U.S. 375 (1966), which are not fully met by the present statutes. To the extent the statutes are inconsistent with Rule 20, they are superseded by the rule.

Rule 20 in authorizing a compulsory medical examination of the defendant (Rules 20.01, subd. 2(3) and 20.02, subd. 1) also provides procedures for avoiding infringement of the defendant's privilege against self-incrimination (Rule 20.02, subd. 6).

Rule 20.01 details the procedures relating to competency to proceed.

Rule 20.01, subd. 1 with some changes of language adopts the provisions of Minn. Stat. § 611.026 (1971) defining competency to proceed and also includes the additional elements as set forth in Unif.R.Crim.P. 463(b) (1987) and ABA Standards for Criminal Justice 7-4.1(b) (1985). The test for competency to proceed set forth in part (1) of the rule is as required by Dusky v. United States, 362 U.S. 402 (1960). The requirement for counsel consulting with the defendant before proceeding under the rule is from Unif.R.Crim.P. 464(c) (1987) and ABA Standards for Criminal Justice 7-4.4(a)(ii) (1985). The standard set forth in the rule for competency to waive counsel is from Unif.R.Crim.P. 711(a) and (d) (1987) and ABA Standards for Criminal Justice 7-5.3(b) (1985). See Rule 5.02 and the Comments to that rule concerning the appointment of counsel generally.

If the court before which the case is pending determines there is reason to doubt the defendant's competency and the charge is a felony or gross misdemeanor, the procedures prescribed by Rules 20.01, subd. 2(2) to 20.01, subd. 9 shall be followed.

If the charge is a misdemeanor, the court has the options of (1) following the procedures prescribed by Rules 20.01, subd. 2(2) to 20.01, subd. 9; (2) causing civil commitment proceedings to be instituted immediately under Minn. Stat. § 253B.07 (1982); or (3) dismissing the case, unless dismissal would be contrary to the public interest (Rule 20.01, subd. 2(1).)

Under Rule 20.01, subd. 2, the prosecuting attorney, defense counsel and the court all have a duty to raise the issue of the defendant's competency if a reasonable doubt of that exists. This is in accord with Unif.R.Crim.P. 464(a) (1987) and ABA Standards for Criminal Justice 7-4.2(a), (b) and (c) (1985). The prohibition in the rule against defense counsel divulging communications in violation of the attorney-client privilege is from Unif.R.Crim.P. 464(b) (1987) and ABA Standards for Criminal Justice 7-4.2(f) (1985).

Rule 20.01, subd. 2(2) provides that upon motion, before proceeding further, the district court shall determine whether the complaint sufficiently states probable cause on its face. If the court determines that probable cause is not sufficiently stated, the case shall be dismissed. If it determines that probable cause is sufficiently stated, the criminal proceedings are suspended and the procedures prescribed by Rules 20.01, subd. 2(2) to 20.01, subd. 9 shall be followed.

The first steps in that procedure under Rule 20.01, subds. 2(3) and (4), are the medical examination of the defendant and a determination of the defendant's competency upon the medical report, or after hearing if objection is made to the report (Rule 20.01, subd. 3). (These rules were originally derived from ALI Model Penal Code §§ 4.04-4.06 and Wis.Stat.§ 971.14). As revised, the rules are in substantial compliance with the Uniform Rules of Criminal Procedure (1987) and the American Bar Association Standards for Criminal Justice (1985). The preference in the rule for an outpatient examination if that can be adequately done is derived from Unif.R.Crim.P. 464(f) (1987) and ABA Standards for Criminal Justice 7-4.3 (1985). If the court determines that a defendant who is otherwise entitled to release will not appear for an outpatient examination, that would be sufficient cause to find that an outpatient examination cannot be adequately done and to order the defendant confined for the examination. See Rule 6 as to whether the defendant would otherwise be entitled to release from custody during the proceedings. In conducting the examination, the rule provides that the examiners may obtain and review any reports of prior examinations conducted under the rule. This includes prior reports conducted under both Rule 20.01 and Rule 20.02 This express authorization, which was adopted in 2005, is intended merely to clarify the rule and not to change it. The provision in Rule 20.01, subd. 2(3) for the mental-health professionals conducting the examination to promptly contact the court and counsel upon concluding the defendant poses any of the serious imminent risks specified is taken from Unif.R.Crim.P. 464(e)(6) (1987) and ABA Standards for Criminal Justice 7-3.2(b) (1985). The requirements for the examination report as set forth in Rule 20.01, subd. 2(4) are in substantial compliance with Unif.R.Crim.P. 464(f) (1987) and ABA Standards for Criminal Justice 7-4.5 (1985). The examiners appointed by the court to examine a defendant for the purpose of determining competency to proceed or for the purpose of a mental illness or mental deficiency defense must have the same qualifications as examiners appointed for civil commitment proceedings. Under Minn. Stat. § 253B.02, subd. 7 (1988) that means the examiner must be "a licensed physician or a licensed consulting psychologist, knowledgeable, trained and practicing in the diagnosis and treatment of the alleged impairment". If simultaneous examinations are ordered pursuant to Rule 20.02, subd. 7, the examiner appointed should then be qualified to provide a report for all the necessary purposes.

The provision in Rule 20.01, subd. 2(3), for the mental-health professionals conducting the examination to promptly contact the court and counsel upon concluding the defendant poses any of the serious imminent risks specified is taken from Unif.R.Crim.P. 464(e)(6) (1987) and ABA Standards for Criminal Justice 7-3.2(b) (1985). The requirements for the examination report as set forth in Rule 20.01, subd. 2(4), are in substantial compliance with Unif.R.Crim.P. 464(f) (1987) and ABA Standards for Criminal Justice 7-4.5 (1985). The examiners appointed by the court to examine a defendant for the purpose of determining competency to proceed or for the purpose of a mental illness or mental deficiency defense must have the same qualifications as examiners appointed for civil commitment proceedings. Under Minnesota Statutes, section 253B.02, subd. 7 (1988), that means the examiner must be "a licensed physician or a licensed consulting psychologist, knowledgeable, trained and practicing in the diagnosis and treatment of the alleged impairment." If simultaneous examinations are ordered pursuant to Rule 20.02, subd. 7, the examiner appointed should then be qualified to provide a report for all the necessary purposes.

Rule 20.01, subd. 3 sets forth the procedure to be followed for determining

competency based upon the report alone or together with a hearing if objection is made to the report. The provisions for going forward with the evidence as set forth in Rule 20.01, subd. 3(2) are taken from Unif. R. Crim. P. 466(f) (1987) and ABA Standards for Criminal Justice 7-4.8(c)(i) (1985). Rule 20.01, subd. 3(3) providing for either party to cross-examine the person who prepared the report or that person's sources is taken from Unif. R. Crim. P. 466(d) (1987) and ABA Standards for Criminal Justice 7-4.8(a)(i) and 7-4.8(b) (1985). The provisions in Rule 20.01, subd. 3(4) concerning defense counsel as a witness on competency are taken from Unif.R.Crim.P. 464(e)(1) and (2) (1987) and ABA Standards for Criminal Justice 7-4.8(b)(i) and (ii) (1985). The evidentiary standard set forth in Rule 20.01, subd. 3(6) is taken from Unif.R.Crim.P. 464(g) (1987) and ABA Standards for Criminal Justice 7-4.8(c)(ii) (1985).

If the defendant is found to be competent, the criminal proceedings shall be resumed (Rule 20.01, subd. 4(1)).

If the defendant is found to be incompetent and the charge is a misdemeanor, the case shall be dismissed (Rule 20.01, subd. 4(2)).

If the charge is a felony or gross misdemeanor and the defendant is found to be incompetent, the criminal proceedings shall continue to be suspended (Rule 20.01, subd. 4(2)), and the court shall follow the procedure established by Rules 20.01, subd. 4(2) to 20.01, subd. 6. For gross misdemeanors, the criminal proceedings must be dismissed by the court 30 days after the finding of incompetency unless the prosecuting attorney has filed with the court by that time a written notice of intention to prosecute the defendant on the gross misdemeanor when the defendant is restored to competency. Additionally, even if such a notice is filed, the proceedings must be dismissed later if the defendant becomes entitled to at least one year of custody credit if the defendant were to be convicted of the gross misdemeanor offense. This would include custody credit for time confined in a jail or correctional facility and also for time confined in a hospital or other facility under this rule (see subdivision 9 of this rule).

If the defendant is under civil commitment under Minn. Stat. Ch. 253B (1982), the civil commitment shall be continued (Rule 20.01, subd. 4(2)(a) and (b)). If the defendant is not under civil commitment, commitment proceedings under Minn. Stat. § 253B.07 (1982) in the probate court shall be instituted against the defendant.

At any time, on motion of the interested parties or on the court's initiative, a hearing shall be held to determine the defendant's competency, and if the defendant is found to be competent, the criminal proceedings shall be resumed. (There is no limitation on the time or number of these hearings.) (Rule 20.01, subd. 5).

The provisions for institution of civil commitment proceedings, for notice and for hearing before the trial court upon the termination of civil commitment and upon the issue of defendant's competency (Rules 20.01, subd. 4(2)(a); 20.01, subd. 4(2)(b); 20.01, subd. 5), and the provision for automatic dismissal of the criminal charges after 3 years (Rule 20.01, subd. 6) are intended to meet the constitutional equal protection and due process requirements established by Jackson v. Indiana, 406 U.S. 715 (1972).

Rule 20.01, subd. 4(2)(c) gives either party the right to appeal to the Court of Appeals from the determination of the court upon the civil commitment proceedings instituted under Rule 20.01, subd. 4(2)(a) and (b). The appeal shall be determined only

upon the record made in the court, which shall be a verbatim record.

During the period of the defendant's incompetency, Rule 20.01, subd. 7 permits the defense attorney to make any legal objection or defense to the prosecution which can be determined without the presence of the defendant. (This could include motions to dismiss the indictment or complaint under Rules 18.02, subd. 2; 17.06) (See Wis.Stat. § 971.14(6)).

By Rule 20.01, subd. 8 statements made by the defendant to the court-appointed examiner for the purpose of the examination under Rule 20.01, subd. 2(3) and evidence derived therefrom are admissible at the proceedings to determine the defendant's competency (Rule 20.01, subd. 3). (See ALI Penal Code, § 4.09, Wis.Stat. § 971.18.) (For the admissibility of these statements at trial, see Rule 20.02, subd. 6.)

Rule 20.01, subd. 9 provides for credit for any confinement to a hospital or other facility under Rule 20.01, subd. 2(3).

Rule 20.02 details the procedures to be followed when the defense is not guilty by reason of mental illness or mental deficiency (Rules 14.01; 9.02, subd. 1(3)(a)).

The definition of mental illness and mental deficiency contained in Minn. Stat. § 611.026 (1971) with its judicial interpretations is not affected by these rules. (See State v. Rawland, 294 Minn. 17, 199 N.W.2d 774 (1972)).

Rule 20.02 is intended, first, to provide a procedure for compulsory mental examination of the defendant without infringing upon the defendant's constitutional privilege against self-incrimination as to statements made by the defendant for the purpose of the examination, (Rules 20.02, subd. 1 to subd. 7) and, second, to provide procedures following an acquittal by reason of mental illness or mental deficiency that will meet constitutional requirements of equal protection and due process (Rule 20.02, subd. 8). (See Jackson v. Indiana, 406 U.S. 715 (1972), McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972).)

By Rule 20.02, subd. 1 an order for compulsory mental examination is triggered by a defense notice under Rule 9.02, subd. 1(3)(a) of an intention to rely on the defense of mental illness or mental deficiency, by the defendant in a misdemeanor case pleading not guilty by reason of mental illness or mental deficiency, or when the defendant offers evidence of mental illness or mental deficiency at trial. Under Rule 9.02, subd. 1(3)(a), in felony and gross misdemeanor cases, a defendant who also intends to rely on the defense of not guilty of the elements of the offense charged must at the same time so notify the prosecution. (See Rule 20.02, subd. 6(2) providing for the trial procedure in the event the defendant gives notice of intention to rely on both the defenses of mental illness or mental deficiency and not guilty.)

Rule 20.02, subd. 1 authorizing compulsory mental examination of the defendant changes existing Minnesota law. (State v. Olson, 274 Minn. 225, 143 N.W.2d 69 (1966)) (For similar provisions and cases upholding their constitutionality, see Wis.Stat. § 971.16; Roberts v. State, 41 Wis.2d 537, 164 N.W.2d 525 (1969); State ex rel. LaFollette v. Raskin, 35 Wis.2d 607, 150 N.W.2d 318 (1967).)

Rule 20.02, subd. 2 providing for the examination is the same as Rule 20.01,

subd. 2(3) governing the examination for competency to proceed. See the comments on Rule 20.01, subd. 2(3) as to the qualifications of the examiners appointed to examine the defendant. Under Rule 20.02, subd. 7 the two examinations as well as any examination under the civil commitment statutes in Minn. Stat. Ch. 253B may by court order be conducted simultaneously. In the order for the examination under Rule 20.02, subd. 2, the court shall direct what the examination and report shall cover. (See Rule 20.02, subd. 4(1), (2), (3).)

Rule 20.02, subd. 3 leaves the imposition of sanctions for failure of the defendant to participate in the examination to the discretion of the trial court to be determined under all of the circumstances. See Rule 20.02, subd. 4 providing that the examiner's report shall if possible contain an opinion as to whether the defendant's failure to participate was the result of the defendant's mental condition.

Rule 20.02, subd. 4 provides what the report of the examination shall contain. Rule 20.02, subd. 4(2) is worded in the language of Minn. Stat.§ 611.026, but is intended to include the judicial interpretations given to that statute. (See State v. Rawland, 294 Minn. 17, 199 N.W.2d 774 (1972).)

Rule 20.02, subd. 5 provides that evidence derived from the examination is inadmissible except when the defendant has raised the issue of his or her mental condition.

Rule 20.02, subd. 6 is intended to provide a procedure for obviating objections on the grounds of self-incrimination to the admissibility at trial of statements made by the defendant for the purpose of the compulsory mental examination under Rules 20.02, subd. 2 and 20.01, subd. 2(3).

If the defendant intends to rely solely on the defense of mental irresponsibility (Rules 9.02, subd. 1(3)(a); 14.01), statements made by the defendant for the purpose of the mental examination and evidence derived from the statements shall be admissible on the trial of that issue, if otherwise admissible under the rules of evidence. (Compare Wis.Stat.§ 971.18).

If, however, the defendant intends to rely on the defense of mental illness or mental deficiency and the defense of not guilty of the elements of the offense charged (Rules 9.02, subd. 1(3)(a); 14.01), there must be a separation of the two defenses for trial (Rules 20.02, subd. 6(2); 20.02, subd. 6(4)). (See also Wis.Stat. § 971.175; State ex rel. LaFollette v. Raskin, 34 Wis.2d 607, 150 N.W.2d 318 (1967).) The mandatory separation of the two defenses for trial under this rule makes it unnecessary to use the procedures outlined in State v. Hoffman, 328 N.W.2d 709 (Minn.1982).

If the two defenses are separated for trial, the statements and evidence derived therefrom will be admissible only upon the trial of the defense of mental illness or mental deficiency, if otherwise admissible under the rules of evidence. (Rule 20.02, subd. 6(3).)

The trial procedure when there is a separation of the two defenses under Rule 20.02, subd. 6(2) is set forth in Rule 20.02, subd. 6(4). (See also Wis.Stat. § 971.175.) The trial shall be continuous before the same jury or judge, with the defense of not guilty of the elements of the offense tried first, and then if necessary, the defense of not guilty by reason of mental illness or mental deficiency.

The jury shall be informed before commencement of the trial that the two defenses have been interposed and of the trial procedures that will be followed in trying them. (Rule 20.02, subd. 6(4)(a).)

Upon the trial of the defense of not guilty, the jury or court shall determine whether the elements of the offense have been proved beyond a reasonable doubt (Rule 20.02, subd. 6(4)(b).)

The form of the determination shall be as follows: (1) "We, the jury, find that the elements of the offense of (name of offense) have been proved beyond a reasonable doubt.", or (2) "We, the jury, find that the elements of the offense of (name of offense) have not been proved beyond a reasonable doubt."

If it is determined that the elements of the offense have been proved, the trial of the defense of mental illness or mental deficiency shall follow immediately before the same jury or court.

Upon the trial of the defense of mental irresponsibility, the jury or court shall render a verdict or make a finding of (1) not guilty by reason of mental illness (See Rule 20.02, subd. 8(1) and (4) for the effect and consequences.); or (2) not guilty by reason of mental deficiency (See Rule 20.02, subd. 8(2) and (4) for the effect and consequences.); or (3) a verdict or finding of guilty (resulting in a judgment of conviction and sentence).

The provisions of Minn. Stat. § 611.026 (1971) placing the burden on the defendant of proving lack of mental responsibility by a preponderance of the evidence are continued by Rule 20.02, subd. 6(4)(b).

The provisions of Rule 20.02, subd. 8 for civil commitment (Rule 20.02, subd. 8(1) and (2)) following an acquittal by reason of mental illness or mental deficiency, for appeal from the determination in the civil commitment proceedings (Rule 20.02, subd. 8(3)), and for continuing supervision by the trial court while the defendant is under commitment (Rule 20.02, subd. 8(4)) are similar to those contained in Rules 20.01, subd. 4 and subd. 5 governing civil commitment of a defendant found incompetent to stand trial. Like those rules, Rule 20.02, subd. 8 is intended to meet constitutional requirements of equal protection and due process. There is no continuing supervision by the criminal trial court in misdemeanor cases.

Rules 20.02, subd. 8(4) and 20.01, subd. 5 both require that the trial court and the prosecuting attorney be notified of any proposed institutional transfer or partial hospitalization status (see Minn. Stat.§ 253B.15, subd. 11) or any proposed discharge, provisional discharge, or other termination of a defendant's civil commitment when that defendant has been found not guilty by reason of mental illness or deficiency or incompetent to proceed. The prosecuting attorney then has the right to participate as a party in any civil proceedings being conducted under the Minnesota Commitment Act of 1982, Minn. Stat. Ch. 253B, concerning those matters. As such, the prosecuting attorney could question and present witnesses and argue for the continued commitment of the defendant in the civil proceedings. A person committed as mentally ill and dangerous can be discharged from that commitment only under the provisions of Minn. Stat.§ 253B.18. Unlike patients committed as mentally ill only, patients committed as mentally ill and dangerous may not seek a discharge or provisional discharge of their commitment

under Minn. Stat. § 253B.17 in the probate court which committed them or from the head of the institution under Minn. Stat. § 253B.16. Rather, Minn. Stat. § 253B.18 permits their discharge or provisional discharge only if ordered by the commissioner of public welfare after receiving a recommendation to that effect from an administrative special review board following a hearing. The commissioner's decision may be appealed to a three judge probate appeal panel appointed by the Supreme Court. The probate appeal panel then conducts a de novo hearing before deciding on the discharge or provisional discharge of the defendant. Minn. Stat. § 253B.19. Beyond that, any party may appeal an adverse decision to the Court of Appeals and an appeal of a release order stays the effect of that order until the appeal is decided by the Court of Appeals. Minn. Stat. § 253B.19, subd. 5. This is basically the same procedure as provided by the previous law under Minn. Stat. § 253A.15 as interpreted by the court in In the Matter of the Mental Illness of K.B.C., 308 N.W.2d 495 (Minn.1981).

Rule 20.03 (which is comparable to Minn.R.Civ.P. 35.03 and 35.04) permits the disclosure to and use by the prosecution of medical reports and hospital and medical records that are relevant to the defense of mental illness or mental deficiency. It includes reports and records that are made both before and after the defense of mental illness or mental deficiency is asserted. These rules allow the prosecution to call a defense-retained psychiatrist to testify at the mental illness portion of a bifurcated trial and such a practice does not violate the defendant's attorney-client privilege or the constitutional right to the effective assistance of counsel. State v. Dodis, 314 N.W.2d 233 (Minn.1982).

The defendant may turn over the copies of the reports and records to the court instead of to the prosecuting attorney. If the defendant does so, the court shall examine them to determine their relevancy. If the court determines they are relevant, they shall be given to the prosecuting attorney. Otherwise they shall be returned to the defendant.

If the defendant is unable to comply with the order of the court for disclosure, either because the defendant does not have access to the reports or records, or for any other reason, a subpoena duces tecum may be issued under Rule 22 for their production. (See Rule 22.02).

By Rule 20.03, subd. 2 the reports and records disclosed to the prosecution under Rule 20.03, subd. 1 and evidence obtained therefrom are admissible only when the defense of mental illness or mental deficiency is the sole defense or when that defense is separated for trial under Rule 20.02, subd. 6(4).

Rule 21. Depositions

Rule 21.01 When Taken

Whenever there is a reasonable probability that the testimony of a prospective witness will be used at hearing or at trial under any of the conditions specified in Rule 21.06, subd. 1, the court before whom the proceedings are pending may, at any time after the filing of a complaint or indictment or entry of a tab charge upon the records, upon motion and notice to the parties, order that the testimony of such witness be taken by oral deposition before any designated person authorized to administer oaths and that any designated book, paper, document, record, recording or other material, not privileged, be produced at the same time and place. The order shall also direct the defendant to be present at the taking of the deposition and, if the defendant is handicapped in

communication, that a qualified interpreter be present for the defendant.

Comment—Rule 21

See comment following Rule 21.08

Rule 21.02 Notice of Taking

The party or person at whose instance a deposition is to be taken shall give to every other party reasonable notice of the time and place for taking the deposition. The notice shall state the name and address of each person to be examined. Unless otherwise ordered by the court the notice to the defendant shall be served personally on all the defendants. The notice shall inform them that they are required by order of court to personally attend the taking of the deposition, and a copy of the court order shall be attached to the notice. An officer having custody of any of the defendants shall be notified of the time and place set for the deposition and shall produce them at the examination and keep them in the presence of the witness during the examination.

On motion of a party upon whom notice is served, the court for cause shown may extend or shorten the time or change the place for taking the deposition.

Comment—Rule 21

See comment following Rule 21.08.

Rule 21.03 Expenses of Defendant and Counsel; Failure to Appear

Subd. 1. Expenses, Defendant and Counsel. If a defendant is unable to bear the expenses of travel and subsistence of himself or herself and defense counsel for attendance at the examination, the court shall direct that such expenses be paid at public expense.

Subd. 2. Failure to Appear. If a defendant who is not confined fails to appear at the examination without reasonable excuse after having received notice thereof, the deposition may be taken and used to the same extent as though the defendant had been present.

Comment—Rule 21

See comment following Rule 21.08.

Rule 21.04 How Taken

Subd. 1. Oral Deposition. Depositions shall be taken upon oral examination.

Subd. 2. Oath and Record of Examination. The witness shall be put on oath and a verbatim record of the testimony of the witness shall be made.

The testimony shall be taken stenographically and transcribed unless the court orders otherwise.

In the event the court orders that the testimony at a deposition be recorded by other than stenographic means, the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at that party's own expense.

Subd. 3. Scope and Manner of Examination--Objections--Motion to Terminate.

(a) In no event shall the deposition of a party defendant be taken without the defendant's consent.

(b) The scope and manner of examination and cross-examination shall be the same as that allowed at trial. Each party having possession of a statement of the witness being deposed shall make the statement available to the other party for examination and use at the taking of a deposition if such other party would be entitled to the statement at the trial.

(c) All objections made at the time of the examination to the qualifications of the person taking the deposition, or to the manner of taking it, or to the evidence presented, or to the conduct of any party, and any other objection to the proceedings shall be recorded by the person before whom the deposition is taken. Evidence objected to shall be taken subject to the objections.

(d) At any time during the taking of the deposition, on motion of a party or of the deponent, and upon a showing that the examination is being conducted in bad faith, or in such manner as to annoy, embarrass, or oppress the deponent or party or to elicit privileged testimony, the court which ordered the deposition taken may order the person conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of taking the deposition by ordering as follows: (1) that certain matters not be inquired into, or that the scope of the examination be limited to certain matters; (2) that the examination be conducted with no one present except persons designated by the court.

Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to move for the order.

Comment—Rule 21

See comment following Rule 21.08.

Rule 21.05 Transcription, Certification and Filing

When the testimony is fully transcribed, the person before whom the deposition was taken shall certify on the deposition that the witness was duly sworn and that the deposition is a verbatim record of the testimony given by the witness. Such person shall then securely seal the deposition in an envelope endorsed with the title of the case and marked "Deposition of (here insert name of witness)" and shall promptly file it with the court in which the case is pending or send it by registered or certified mail to the clerk thereof for filing.

Upon the request of a party, documents and other things produced during the examination of a witness, or copies thereof, shall be marked for identification and annexed as exhibits to the deposition, and may be inspected and copied by any party. If

the person producing the exhibits requests their return, the person taking the deposition shall mark them, and, after giving each party an opportunity to inspect and copy them, return the exhibits to the parties producing them. The exhibits may then be used in the same manner as if annexed to the deposition.

Comment—Rule 21

See comment following Rule 21.08.

Rule 21.06 Use of Deposition

Subd. 1. Unavailability of Witness. At the trial, or upon any hearing, a part or all of a deposition, so far as otherwise admissible under the rules of evidence, may be used as substantive evidence if it appears: (a) that the witness is dead or unable to be present or to testify at the trial or hearing because of then existing physical or mental illness or infirmity; or (b) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena, order of court, or other reasonable means.

Subd. 2. Inconsistent Testimony. A deposition may be used as substantive evidence, so far as otherwise admissible under the rules of evidence, if the witness gives testimony at the trial or hearing inconsistent with the deposition or if the witness persists at the hearing or trial in refusing to testify despite an order of the court to do so.

Subd. 3. Impeachment. Any deposition may also be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a witness.

A deposition may not be used if it appears that the absence of the witness was procured or caused by the party offering the deposition, unless part of the deposition has previously been offered by another party.

Comment—Rule 21

See comment following Rule 21.08.

Rule 21.07 Effect of Errors and Irregularities in Depositions

Subd. 1. As to Notice. All errors and irregularities in the order or notice for taking a deposition are waived unless written objection is served promptly upon the party giving the notice.

Subd. 2. As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the person before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the grounds for disqualification become known or could be discovered with reasonable diligence.

Subd. 3. As to Taking of Deposition. Objections to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition unless the ground of the objection is one which might have been obviated or removed if presented at that time.

Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of the parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

Subd. 4. As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed or the deposition is prepared, recorded, certified, sealed, endorsed, transmitted, filed or otherwise dealt with by the person taking the deposition under these rules are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

Comment—Rule 21

See comment following Rule 21.08.

Rule 21.08 Deposition by Stipulation

The parties may by written stipulation provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions. These rules to the extent not inconsistent with the stipulation shall otherwise govern the taking of the deposition.

Comment—Rule 21

Rule 21 is adapted from F.R.Crim.P. 15; Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15 (1971), 52 F.R.D. 409, 438; Minn.R.Civ.P. 28-30; and F.R.Civ.P. 30. Existing Minnesota law contains no provision for depositions to be taken on behalf of the prosecution in criminal cases. Minn. Stat. § 611.08 (1971) for taking depositions on behalf of the defendant is superseded by Rule 21. Minn. Stat. Ch. 597 (1971) where applicable to criminal cases is superseded to the extent it is inconsistent with Rule 21.

Under Rule 21.01, an order may be made for taking the oral deposition of a prospective hearing or trial witness of either party only upon a showing of reasonable probability that the witness will be unavailable at the hearing or trial because of the conditions specified in Rule 21.06, subd. 1. (Rule 21.01 is adapted from F.R.Crim.P. 15(a) and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(a) (1971), 52 F.R.D. 409, 438-439.) The requirement that a qualified interpreter be present for defendants handicapped in communication is based upon Rule 5 and Minn. Stat. §§ 611.31- 611.34 (1992).

The deposition may be taken before any person authorized to administer oaths designated by the order. If the deposition is taken outside the State of Minnesota, this would include any person authorized to administer oaths by the laws of Minnesota or of the state where the deposition is taken. (See Moore v. Kelsey, 26 Wash.2d 31, 173 P.2d 130 (1946).)

Rule 21.02 providing for notice to the defendants and for the production of those in custody at the taking of the deposition is adapted from Preliminary Draft of Proposed

Amendments to F.R.Crim.P. 15(b) (1971), 52 F.R.D. 409, 439. Notice shall normally be personally served on the defendant. However, in cases where the defendant is unavailable and time is of the essence, the court may order that notice be served on the defendant's attorney instead of the defendant. These rules do not deal with the constitutionality of the use of a deposition at trial when the defendant has not been personally notified.

The provisions of Rule 21.03, subd. 1 for the payment of the expenses of an indigent defendant comes from F.R.Crim.P. 15(c) and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(c) (1971), 52 F.R.D. 409, 440.

Rule 21.03, subd. 2 providing for the consequences of a defendant's failure to appear at the deposition is adapted from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(b) (1971), 52 F.R.D. 409, 440.

Rule 21.04, subd. 2 providing for recording a deposition by other than stenographic means if the court so orders follows F.R.Civ.P. 30(b)(4).

Rule 21.04, subd. 3 relating to the deposition of a party defendant and the scope of examination and cross-examination is adapted from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(d) (1971), 52 F.R.D. 409, 440-441.

Rule 21.04, subd. 3(c) providing for objections follows substantially the language of Minn.R.Civ.P. 30.03. The time and manner of making objections and the conditions under which objections are waived are treated in Rule 21.07.

Rule 21.04, subd. 3(d) for termination or limitation of the deposition is adapted from the language of Minn.R.Civ.P. 30.04 and F.R.Civ.P. 30(d).

Rule 21.05 governing the certification and filing of the deposition comes from Minn.R.Civ.P. 30.06 and F.R.Civ.P. 30(f). Rule 21.05 does not, however, require that the deposition be submitted to and signed by the witness. It requires only that the person before whom the deposition is taken certify that the deposition is a true record of the testimony given by the witness. Any dispute over the accuracy of the record shall be dealt with under Rule 21.07, subd. 4 (completion and return of deposition).

The last paragraph of Rule 21.05 governing exhibits is adapted from F.R.Civ.P. 30(f).

Rule 21.06 establishes the circumstances under which a deposition can be used during a trial or hearing if a deposition exists. The right to obtain a deposition from a prospective witness, however, is governed by Rule 21.01 and under that rule a deposition can be ordered by the court only if there is a reasonable probability that the prospective witness will be unavailable for the trial or hearing for any of the reasons specified in subdivision 1 of Rule 21.06.

Under Rule 21.06 a deposition may be used as substantive evidence when the witness is unavailable within the meaning of Rule 21.06, subd. 1. (Compare Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(e) (1971), 52 F.R.D. 409, 441.)

The deposition may also be used (1) as substantive evidence if the witness gives

inconsistent testimony at the trial (Rule 21.06, subd. 2) (See Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(e) (1971), 52 F.R.D. 409, 441; California v. Green, 399 U.S. 149 (1970); Rules of Evidence For United States District Courts 801(c)(2) (Effective Date, July 1, 1973).); (2) as substantive evidence if the witness refuses to testify at trial (Rule 21.06, subd. 2) See Preliminary Draft of Proposed Amendments to F.R.Crim.P. 15(g)(2) (1971), 52 F.R.D. 409, 442 or (3) for impeachment. (See F.R.Crim.P. 15(e).)

The last sentence of Rule 21.06, subd. 3, relating to the use of a deposition when the absence of the witness was caused by the party offering the deposition, is adapted from F.R.Crim.P. 15(e).

Rule 21.07, subd. 1 for objections to the order of notice is taken from Minn.R.Civ.P. 32.01.

Rule 21.07, subd. 2 for objections to the qualifications of the person taking the deposition follows the language of Minn.R.Civ.P. 32.02.

Rule 21.07, subd. 3 covering objections to evidence is the same as Minn.R.Civ.P. 32.03(1), (2).

Rule 21.07, subd. 4 for objections to errors in the completion and return of the deposition adopts the language of Minn.R.Civ.P. 32.04.

Rule 21.08 providing for depositions by stipulation is adapted from Minn.R.Civ.P. 29.

Rule 22. Subpoena

Rule 22.01 For Attendance of Witnesses; Form; Issuance

Subd. 1. When Issued. A subpoena may be issued in a criminal proceeding only for the attendance of a witness before a grand jury, or at a hearing or trial before the court in which the proceeding is pending, or for attendance at the taking of a deposition.

Subd. 2. By Whom Issued. A subpoena shall be issued by the clerk under the seal of the court. It shall state the name of the court and the title of the proceeding if the subpoena be for a hearing or trial before the court; but if the subpoena be for a grand jury, it shall be headed "In the matter of the investigation of the grand jury of the (particular) county conducting the proceeding." The subpoena shall command each person to whom it is directed to attend and give testimony at the time and place specified therein. The clerk shall issue a subpoena, or a subpoena for the production of documentary evidence or tangible things, signed and sealed but otherwise in blank to the party requesting it, who shall fill in the blanks before it is served.

Subd. 3. Unrepresented Defendant. A subpoena shall not be issued at the request of a defendant not represented by counsel without an order of court authorizing its issuance. The defendant's request to the court may be oral and the court's order may be either oral, if noted in the court's record, or written.

Comment—Rule 22

See comment following Rule 22.06.

Rule 22.02 For Production of Documentary Evidence and of Objects

A subpoena may also command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive. The court may direct that books, papers, documents or objects designated in the subpoena, including medical reports and medical and hospital records ordered to be disclosed under Rule 20.03, subd. 1, be produced before the court at a time prior to the trial or prior to the time when they are to be offered in evidence and may upon their production permit them to be inspected by the parties or their attorneys.

Comment—Rule 22

See comment following Rule 22.06.

Rule 22.03 Service

A subpoena may be served by the sheriff, by a deputy sheriff, or any other person at least 18 years of age who is not a party. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by leaving a copy at the person's usual place of abode with some person of suitable age and discretion then residing therein. Additionally, a subpoena may be served by U.S. mail, but such service is effective only if the person named therein returns a signed admission acknowledging personal receipt of the subpoena. Fees and mileage need not be tendered in advance.

Comment—Rule 22

See comment following Rule 22.06.

Rule 22.04 Place of Service

A subpoena requiring the attendance of a witness may be served at any place within the state.

Comment—Rule 22

See comment following Rule 22.06.

Rule 22.05 Contempt

Failure to obey a subpoena without adequate excuse is a contempt of court.

Comment—Rule 22

See comment following Rule 22.06.

Rule 22.06 Witness Outside the State

The attendance of a witness who is outside the state may be secured as provided by law.

Comment—Rule 22

Rule 22 is patterned upon F.R.Crim.P. 177 and Minn.R.Civ.P. 45 and supersedes Minn. Stat. Ch. 596 (1971) to the extent Ch. 596 is inconsistent with Rule 22.

Rule 22.01, subd. 1 prescribes the only purposes for which a subpoena may be issued in a criminal proceeding, that is, for appearance (1) before a grand jury, (2) at a hearing or trial, and (3) at the taking of a deposition.

Subpoenas for attendance at a deposition may be issued only if the court under Rule 21.01 has ordered the deposition or the parties have stipulated for a deposition by Rule 21.08.

Under Rule 22.01, subd. 2 a subpoena shall be issued by the clerk. (This changes Minn. Stat. §§ 357.32, 388.05 for the issuance of subpoenas by the county attorney for grand jury and criminal cases.)

The provisions of Rule 22.01, subd. 2 for the form and issuance of a subpoena follow F.R.Crim.P. 17(a) and Minn.R.Civ.P. 45.01, except that a subpoena duces tecum for production of evidence at a deposition may not be issued without an order of court authorizing the subpoena under Rule 21.01 or a stipulation under Rule 21.08.

Rule 22.01, subd. 3 restricting the issuance of a subpoena at the request of an unrepresented defendant except on order of court is intended to prevent the indiscriminate use of subpoenas. This rule supersedes Minn. Stat. § 611.06 (1971) to the extent the statute is inconsistent with the rule.

The provisions of Rule 22.02 for subpoenas duces tecum are taken from F.R.Crim.P. 17(c) and Minn.R.Civ.P. 45.02. A subpoena duces tecum for production of evidence at a deposition may not be issued without an order of court authorizing the subpoena duces tecum under 21.01 or stipulation under Rule 21.08.

Rule 22.03 providing for service of a subpoena follows Minn.R.Civ.P. 45.03 except that the person serving it must be at least 18 years of age and no fees or mileage need be tendered. Additionally Rule 22.03 permits the subpoena to be served by U.S. Mail, but such service is effective only if the person named in the subpoena returns a signed admission of service. If service by mail is not so admitted the contempt sanction specified by Rule 22.05 is not available to enforce the subpoena.

Under Rule 22.04 a subpoena may be served any place in the state. There are no limitations on the distance to the place in the state where the witness may be required to attend under a subpoena. (This is different from Minn.R.Civ.P. 45.04(2), 45.05.) (This rule changes Minn. Stat. § 597.11 (1971).)

Rule 22 is intended to apply only to criminal proceedings pending in the State of Minnesota. It does not affect Minn. Stat. § 634.06 (1971) providing a method for compelling Minnesota residents to testify in criminal cases in other states.

Rule 22.05 for contempt follows Minn.R.Civ.P. 45.06.

Rule 22.06 continues the provisions of Minn. Stat. § 634.07 (1971) for compelling the attendance of non-residents to testify in criminal cases in Minnesota.

Rule 23. Petty Misdemeanors and Violations Bureaus

Rule 23.01 Definition of Petty Misdemeanor

As used in these rules, petty misdemeanor means a misdemeanor offense punishable only by fine of not more than $100 or such other dollar amount as is established by Minn. Stat. § 609.02, subd. 4a or other statute as the maximum fine for a petty misdemeanor.

Comment—Rule 23

See comment following Rule 23.06.

Rule 23.02 Designation as Petty Misdemeanor by Sentence Imposed

A conviction is deemed to be for a petty misdemeanor as defined by Rule 23.01 if the sentence imposed is within the limits provided by that rule for a petty misdemeanor.

Comment—Rule 23

See comment following Rule 23.06.

Rule 23.03 Violations Bureaus

Subd. 1. Establishment. The district court may establish misdemeanor violations bureaus at the places it determines.

Subd. 2. Fine Schedules.

(1) Uniform Fine Schedule. The district court judges of the state shall adopt and as necessary revise a uniform fine schedule setting forth fines to be paid to violations bureaus for all statutory petty misdemeanors and for such other statutory misdemeanors as the judges may select.

(2) County Fine Schedules. Upon establishment of a violations bureau, the district court shall establish by court rule, for each county, a fine for any misdemeanor which may be paid to the violations bureau in lieu of a court appearance by the defendant. When an offense is the same or substantially the same as an offense included on the uniform fine schedule, the fine established by the district court shall be the same as the fine prescribed in the uniform fine schedule.

Subd. 3. Fine Payment. A defendant shall be advised in writing before paying a fine to a violations bureau that such a payment constitutes a plea of guilty to the misdemeanor designated and an admission that the defendant understands that the defendant has the rights which the defendant voluntarily waives:

a. to a trial to the court or to a jury;
b. to be represented by counsel;
c. to be presumed innocent until proven guilty beyond a reasonable doubt;
d. to confront and cross-examine all prosecution witnesses; and
e. to either remain silent or to testify for the defense.

Subd. 4. Functions of Violations Bureau. The violations bureau shall process all citations for misdemeanors included on the county fine schedule, accept all fines payable on such citations at the bureau, set dates for arraignment on such citation charges to be heard in court, accept bail, keep proper records and accounts and perform such other duties as the court prescribes.

Subd. 5. Procedures of the Violations Bureau. The district court shall supervise and the clerk shall operate the misdemeanor violations bureaus. The district court shall, consistent with these rules, issue rules governing the duties and operation of the bureaus. The clerk shall assign one or more deputy clerks to discharge and perform the duties of the bureaus.

Comment—Rule 23

See comment following Rule 23.06.

Rule 23.04 Designation as a Petty Misdemeanor in a Particular Case

If at or before the time of arraignment or trial on an alleged misdemeanor violation, the prosecuting attorney certifies to the court that in the prosecuting attorney's opinion it is in the interests of justice that the defendant not be incarcerated if convicted, the alleged offense shall be treated as a petty misdemeanor if the defendant consents and the court approves.

Comment—Rule 23

See comment following Rule 23.06.

Rule 23.05 Procedure in Petty Misdemeanor Cases

Subd. 1. No Right to Jury Trial. There shall be no right to a jury trial upon a misdemeanor charge which by operation of Rule 23.04 is to be treated as a petty misdemeanor.

Subd. 2. Right to Appointed Counsel. If a defendant is financially unable to afford counsel, the Court shall, unless waived, appoint counsel to represent such a defendant who is charged with a misdemeanor which by operation of Rule 23.04 is to be treated as a petty misdemeanor and which also involves moral turpitude.

Subd. 3. General Procedure. A defendant charged with a petty misdemeanor violation is presumed innocent until proven guilty beyond a reasonable doubt and except as otherwise provided in Rule 23 the procedure in petty misdemeanor cases shall be the same as for misdemeanors punishable by incarceration.

Comment—Rule 23

See comment following Rule 23.06.

Rule 23.06 Effect of Conviction

A petty misdemeanor shall not be considered a crime.

Comment—Rule 23

Procedure is established to dispose of certain designated minor offenses without the necessity of a court appearance, and also to reduce a misdemeanor punishable by incarceration to one punishable by fine only, before trial of the alleged offense.

The definition of petty misdemeanor as used in Rule 23 is, under Rule 23.01, broader than the definition provided by Minn. Stat. § 609.02, subd. 4a. By that statute a petty misdemeanor refers solely to a statutory violation punishable only by a fine of not more than the specified amount. Under Rule 23.01, read in conjunction with the definition of "misdemeanor" in Rule 1.01, the term petty misdemeanor as used in Rule 23 refers also to violations of local ordinances, charter provisions, rules, or regulations.

These rules do not specify any procedures or sanctions for enforcing payment of fines in petty misdemeanor cases. Existing law, however, does permit some enforcement methods. The court may delay acceptance of a plea agreement until the defendant has the money to pay the agreed fine. If a defendant is unable to pay a fine when imposed, the court may set a date by which the defendant must either pay the fine or reappear in court. If the fine is not paid by the date set and the defendant does not reappear as ordered to explain why it has not been paid, the court may issue a bench warrant for the defendant's arrest and set bail in the amount of the fine. Any bail collected could then be used under Minn. Stat. § 629.53 to pay the fine. Contempt procedures under Minn. Stat. Ch. 588 can also be used to enforce payment of a fine when the defendant has willfully refused payment. The prosecuting attorney may refuse to reduce an offense to a petty misdemeanor if the defendant has failed to pay any past fines. The possibility of an administrative sanction exists if the defendant has failed to pay a fine imposed upon conviction of violating a law regulating the operation or parking of motor vehicles. In such cases, the commissioner of public safety is required under Minn. Stat. § 171.16, subd. 3, to suspend the defendant's license for 30 days or until the fine is paid if the court determines that the defendant has the ability to pay the unpaid fine. Similar sanctions for non-traffic offenses might prove effective, but would require legislative action.

Rule 23.02 providing that a conviction is deemed to be for a petty misdemeanor if the sentence imposed is not more than $100 or such other amount as is set by the legislature as the maximum petty misdemeanor fine is similar to Minn. Stat. § 609.13 which provides for the reduction of a felony to a gross misdemeanor or misdemeanor and for the reduction of a gross misdemeanor to a misdemeanor. Rule 23.06 provides that a petty misdemeanor shall not be considered a crime.

Rule 23.03 gives the court authority to establish violations bureaus and establishes certain procedures for such bureaus. Rule 23.03, subd. 1 is similar to Minn. Stat. § 487.28, subd. 1 except that the violations bureau under the rule may handle any misdemeanor designated by the court and not just traffic and ordinance violations. See Minn. Stat. §§ 488A.08, 488A.25, and 487.28 (1981) as to the establishment of violations

bureaus in Hennepin County, Ramsey County, and all other counties, respectively.

For the purpose of providing uniformity in the fines imposed for certain common misdemeanors throughout the state, Rule 23.03, subd. 2(1) provides that the district court judges of the state shall adopt a uniform fine schedule setting forth the fines to be paid to violations bureaus for all statutory petty misdemeanors and for such other statutory misdemeanors as the judges select. As necessary, the judges should revise the schedule to assure that the fines thereon are appropriate and to add new offenses. For the purpose of adopting a uniform schedule, the President of the Minnesota Judges' Association or the successor organization to that association shall call such meetings as are necessary of all district court judges of the state.

Rule 23.03, subd. 2(2) provides for the establishment of a county fine schedule. This schedule will include all misdemeanors and petty misdemeanors for which a fine may be paid at a violations bureau in lieu of a court appearance. The county fine schedule should be established by the district court and may specify a fine for any misdemeanor, including ordinance violations, whether or not included on the uniform fine schedule. When the offense, however designated, is the same or substantially the same as a statutory offense included on the uniform fine schedule, then the fine in the county schedule must be the same as that prescribed in the uniform schedule. Therefore, the fine for an illegal turn under an ordinance, if included on a county fine schedule, must be the same as provided in the uniform schedule for an illegal turn under the statute.

Rule 23.03, subd. 3 provides that a defendant must be advised in writing that payment of a fine through a violations bureau constitutes a plea of guilty to the designated offense and an admission that the defendant understands and waives those rights specified in the rule.

The written advice required by Rule 23.03, subd. 3 could be included upon the citation issued for the offense. This citation could be set forth in the form of an envelope for mailing the fine to the bureau. In such suitable form, the fine schedule should be included to advise the defendant of the fine for the particular offense charged. This rule does not require a defendant to sign a written plea of guilty.

Rule 23.03, subds. 4 and 5 concerning the functions and procedures of the violations bureaus are substantially the same as Minn. Stat. § 487.28, subd. 2. To the extent there are any inconsistencies that statute is superseded.

Rule 23.04 provides that, with the consent of the defendant and approval of the court, a misdemeanor otherwise punishable by incarceration shall be treated as a petty misdemeanor on the certification of the prosecutor. This certification should allege that in the prosecutor's opinion it is in the interests of justice, irrespective of the outcome, that the defendant not be incarcerated. If this procedure is followed, the defendant upon conviction may be fined no more than the amount specified in Rule 23.01 as the maximum fine for a petty misdemeanor. The defendant, however, then has no right to the jury trial to which the defendant would otherwise be entitled under Rule 26.01, subd. 1(1)(a) (see Rule 23.05, subd. 1). Also, under Rule 23.05, subd. 2, the defendant financially unable to afford counsel will not automatically have counsel appointed on request as would otherwise occur under Rule 5.02 unless the certified petty misdemeanor involves moral turpitude. See also Rule 5.02 as to the appointment of counsel upon request of the

defendant or interested counsel or upon the court's initiative when the prosecution is for a misdemeanor not punishable by incarceration and moral turpitude is not involved.

See also Rule 5.02 as to the appointment of counsel upon request of the defendant or interested counsel when the prosecution is for a misdemeanor not punishable by incarceration.

Contrary to what is provided in Rule 23.04, Minn. Stat. § 609.131 enacted by the legislature in 1987 (Chapter 329, Section 6) purports to allow the reduction of a misdemeanor to a petty misdemeanor without the consent of the defendant. The Advisory Committee is aware of this statute, but after consideration rejects any change in the Rule. On such matters of procedure the Rules of Criminal Procedure take precedence over statutes to the extent there is any inconsistency. State v. Keith, 325 N.W.2d 641 (Minn.1982).

Rule 23.05, subd. 3 provides that the procedure in cases where an offense has been designated as a petty misdemeanor under Rule 23.04 shall be the same as for misdemeanors punishable by incarceration, except for the right to a jury trial and to counsel which are governed by Rule 23.05, subds. 1 and 2.

By Rule 23.06 a petty misdemeanor shall not be considered a crime. This rule covers offenses designated as petty misdemeanors by the applicable statute or ordinance. The rule also covers misdemeanor offenses designated to be treated as petty misdemeanors under Rule 23.04 and misdemeanor offenses deemed to be petty misdemeanors under Rule 23.02 by reason of the sentence imposed by the court.

Rule 24. Venue

Rule 24.01 Place of Trial

The case shall be tried in the county where the offense was committed except as otherwise provided by these rules.

Comment—Rule 24

See comment following Rule 24.03.

Rule 24.02 Venue in Special Cases

Subd. 1. Offense Committed on Public or Private Conveyance. When any offense is committed within the state on a public or private conveyance, and it is doubtful in which county the offense occurred, the case may be prosecuted and tried in any county through which the conveyance traveled in the course of the trip during which the offense was committed, or in the county where such trip began or terminated.

Subd. 2. Offenses Committed on County Lines. Offenses committed on or within 1,500 feet (457.2M) of the boundary line between two counties may be alleged in the complaint or indictment to have been committed in either of them and may be prosecuted and tried in either county.

Subd. 3. Injury or Death in One County from an Act Committed in Another

County. If an act is committed in one county resulting in injury or death in another county, the offense may be prosecuted and tried in either county. If it is doubtful in which one of two or more counties the act was committed or injury or death occurred, the offense may be prosecuted and tried in any one of such counties.

Subd. 4. Prosecution in County Where Injury or Death Occurs. If an act is committed either within or without the limits of the state and injury or death results, the offense may be prosecuted and tried in the county of this state where the injury or death occurs, or the body of the deceased is found.

Subd. 5. Prosecution When Death Occurs Outside State. If an assault is committed in this state resulting in death outside the state, the homicide may be prosecuted and tried in the county where the assault was committed.

Subd. 6. Kidnapping. The offense of kidnapping may be prosecuted and tried either in the county where the offense was committed or in any county through or in which the person kidnapped was taken or kept while under confinement or restraint.

Subd. 7. Libel. The offense of publication of a libel contained in a newspaper published in the state may be prosecuted and tried in any county where the paper was published or circulated; but a person shall not be prosecuted for publication of the same libel against the same person in more than one county.

Subd. 8. Bringing Stolen Goods Into State. Whoever brings stolen property into the state in violation of Minn. Stat. § 609.525 (1971) may be prosecuted and tried in any county, but not more than one county, into or through which the property was brought.

Subd. 9. Obscene or Harassing Telephone Calls. Violations of Minn. Stat. § 609.79 (1971) may be prosecuted and tried either at the place where the telephone call is made or where it is received.

Subd. 10. Fair Campaign Practices. Violations of Minn. Stat. § 211B.15 (2000) prohibiting corporate contributions to political campaigns may be prosecuted and tried in the county where such payment or contribution is made or services rendered or in any county wherein such money has been paid or distributed.

Subd. 11. Series of Offenses Aggregated. When a series of offenses are aggregated pursuant to Minn. Stat. § 609.52, subd. 3(5) (2000) and the offenses have been committed in more than one county, the case may be presented and tried in any one of the counties in which one or more of the offenses was committed.

Subd. 12. Non-Support of Spouse or Child. Violations of Minn. Stat. § 609.375 (2001) for non-support of spouse or child may be prosecuted and tried in the county where the defendant, spouse or child reside.

Subd. 13. Refusal to Submit to Chemical Test Crime. Violations of Minn. Stat. § 169A.20, subd. 2 for refusal to submit to a chemical test may be prosecuted either in the jurisdiction where the arresting officer observed the defendant driving, operating, or in the control of the motor vehicle or in the jurisdiction where the refusal occurred.

Subd. 14. Contributing to Need for Protection or Services for a Child. Violations of Minn. Stat. § 260C.425 for contributing to need for protection or services for a child, may be prosecuted and tried in the county where the child is found or resides or where the alleged act of contributing occurred.

Subd. 15. Criminal Tax Penalties. If two or more violations of Minn. Stat. § 289A.63 are committed by the same person in more than one county, the person may be prosecuted and tried in any county in which one of the violations was committed.

Subd. 16. Municipalities in More than One County. The place of prosecution and trial for offenses subject to prosecution under the provisions of Minn. Stat. ch. 487, which occur in a municipality located in more than one judicial district, or in more than one county within a judicial district, shall be determined pursuant to Minn. Stat. § 487.21, subd. 4 and any successor statutes. The place of prosecution and trial for misdemeanor and gross misdemeanor offenses which occur in the city of St. Anthony shall be determined pursuant to Minn. Stat. § 488A.01, subd. 6 and any successor statutes.

Subd. 17. Depriving Another of Custodial or Parental Rights. Violations of Minn. Stat. § 609.26 for depriving another of custodial or parental rights may be prosecuted and tried either in the county in which the child was taken, concealed, or detained, or in the county of lawful residence of the child.

Subd. 18. Child Abuse. A criminal action arising out of an incident of alleged child abuse may be prosecuted and tried either in the county where the alleged abuse occurred or the county where the child is found.

Comment—Rule 24

See comment following Rule 24.03.

Rule 24.03 Change of Venue

Subd. 1. Grounds. The case may be transferred to another county:

a. If the court is satisfied that a fair and impartial trial cannot be had in the county in which the case is pending;
b. For the convenience of parties and witnesses;
c. In the interests of justice;
d. As provided by Rule 25.02 governing prejudicial publicity.

Subd. 2. County to Which Transferred. For the purposes of change of venue under this rule the district referred to in Minn. Const. Art. I, § 6 shall be all that area within the geographical boundaries of the State of Minnesota.

Subd. 3. Time for Motion for Change of Venue. A motion for change of venue, except as permitted by Rule 25.02, shall be made at the time prescribed by Rule 10 for making pretrial motions.

Subd. 4. Proceedings on Transfer. If the case is transferred under these rules, all records in the case or certified copies thereof shall be transmitted to the court to which the case is transferred. If the defendant is in custody, the court may order that the

defendant be transported to the sheriff of the county to which the case is transferred. Unless the Supreme Court orders otherwise, the case shall be tried before the judge who ordered the change of venue. If the defendant has been released upon conditions of release under these rules those conditions shall be continued upon the further condition that the defendant shall appear as ordered by the court for trial and other proceedings in the county to which the case has been transferred.

Comment—Rule 24

Rule 24.01 Place of Trial.

Except as provided in Rule 24.02 governing special cases, and Rule 24.03 governing change of venue, criminal cases shall be tried in the county where the offense was committed. This adopts the general rule provided by Minn. Stat. § 627.01 (1971). By Rule 11.01 Omnibus Hearings may be held in any county in the district court's judicial district in which the offense was committed. The place of filing a complaint is provided for by Rule 2.01; the defendant's first appearance in court (a) following an arrest upon a complaint by Rules 3.02, subd. 2 and 4.01 or (b) following an arrest without a warrant by Rule 4.02, subd. 5; the defendant's appearance in the district court following a complaint (Rule 8) by Rule 5.03. Objections to the place of trial are waived unless asserted before commencement of the trial.

Rule 24.02 Venue in Special Cases.

This rule is adopted from the provisions of existing law as follows:

Rule 24.02, subd. 1 (Offense Committed on Public or Private Conveyances) from Minn. Stat. §§ 627.05, 627.06 (1971) (This would include offenses committed on water-craft, aircraft, or vehicles.);

Rule 24.02, subd. 2 (Offenses Committed on County Lines) from Minn. Stat. § 627.07 (1971);

Rule 24.02, subd. 3 (Injury or Death in One County from an Act Committed in Another County) from Minn. Stat. § 627.08 (1971);

Rule 24.02, subd. 4 (Prosecution in County Where Injury or Death Occurs) from Minn. Stat. § 627.09 (1971);

Rule 24.02, subd. 5 (Prosecution When Death Occurs Outside State) from Minn. Stat. § 627.10 (1971);

Rule 24.02, subd. 6 (Kidnapping) from Minn. Stat. § 627.13 (1971);

Rule 24.02, subd. 7 (Libel) from Minn. Stat. § 627.14 (1971);

Rule 24.02, subd. 8 (Bringing Stolen Goods Into State) from Minn. Stat.§ 609.525;

Rule 24.02, subd. 9 (Obscene or Harassing Telephone Calls) from Minn. Stat. § 609.79 (1971);

Rule 24.02, subd. 10 (Fair Campaign Practices) from Minn. Stat. § 211B.15 (2000);

Rule 24.02, subd. 11 (Series of Offenses Aggregated) from Minn. Stat. § 609.52, subd. 3(5) (2000);

Rule 24.02, subd. 12 (Non-Support of Spouse or Child) from Minn. Stat. § 609.375 (2000).

Rule 24.02, subd. 13 (Refusal to Submit to a Chemical Test Crime) from Minn. Stat. § 169A.43, subd. 3 (2000);

Rule 24.02, subd. 14 (Contributing to Need for Protection or Services for a Child) from Minn. Stat. § 260C.425, subd. 2 (2000);

Rule 24.02, subd. 15 (Criminal Tax Penalties) from Minn. Stat. § 289A.63, subd. 11 (2000);

Rule 24.02, subd. 16 (Municipalities in More than One County) from Minn. Stat. § 487.21, subd. 4 (2000) and Minn. Stat. § 488A.01, subd. 6 (2001);

Rule 24.02, subd. 17 (Depriving Another of Custodial or Parental Rights) from Minn. Stat. § 609.26, subd. 3 (2000); and

Rule 24.02, subd. 18 (Child Abuse) from Minn. Stat. § 627.15 (2000).

Rule 24.03 Change of Venue.

Rule 24.03, subd. 1 (Grounds for Change of Venue) permits a change of venue upon motion of the defendant or prosecution or on the court's initiative upon any of the grounds specified in the rule. Change of venue (a) for a fair and impartial trial (Rule 24.03, subd. 1a) is taken from Minn. Stat. § 627.01 (1971); (b) for the convenience of parties and witnesses (Rule 24.03, subd. 1b) from F.R.Crim.P. 21(b); (c) in the interests of justice (Rule 24.03, subd. 1c) from F.R.Crim.P. 21(b) and Minn. Stat. § 627.04 (1971); and (d) to avoid prejudicial publicity (Rule 25.02) from ABA Standards, Fair Trial and Free Press, 3.2(c) (Approved Draft, 1968).

Rule 24.03, subd. 2 (County to Which Transferred). Under this rule change of venue may be ordered upon any of the specified grounds to any county of the state. Minn.Const. Art. I, § 6 provides that the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. Rule 24.01 provides that a criminal case shall be tried in the county where the offense was committed thus establishing the district referred to in the constitution. For the purpose of change of venue under Rule 24.03, subd. 2, however, the district of trial may be any county in the state.

Rule 24.03, subd. 3 (Time for Motion for Change of Venue). Except as provided by Rule 25.02 (Special Rules Governing Prejudicial Publicity) a motion for change of venue shall be made at the time prescribed by Rule 10.04, subd. 1 for making pretrial

motions (3 days before the Omnibus Hearing (Rule 11)) and shall be heard at that hearing unless the court for good cause orders otherwise. As to when jeopardy attaches, see comment to Rule 25.02.

Rule 24.03, subd. 4 (Proceedings on Transfer) is taken from F.R.Crim.P. 21(c) and Minn. Stat. § 627.03 (1971). It further provides that unless the supreme court orders otherwise it shall be tried before the judge who ordered the change of venue. The rule does not change Minn. Stat. § 627.02 (1971) governing the payment of costs. If the defendant has been released upon conditions of release, those conditions shall be continued, conditioned upon appearance for trial in the county to which venue has been transferred as ordered by the court. This provision takes the place of Minn. Stat. § 627.03 (1971).

Rule 25. Special Rules Governing Prejudicial Publicity

The following rules shall govern when any question of potentially prejudicial publicity is raised.

Rule 25.01 Pretrial Hearings--Motion to Exclude Public

The following rules shall govern the issuance of any court order excluding the public from any pretrial hearing and restricting access to any transcripts or orders developed from such closed pretrial hearings.

Subd. 1. Grounds for Exclusion of Public. All pretrial hearings shall be open to the public. However, all or part of such hearing may be closed to the public on motion of the defendant or the prosecuting attorney or on the court's initiative on the ground that dissemination of evidence or argument adduced at the hearing may interfere with an overriding interest including that it may disclose matters that may be inadmissible in evidence at the trial and likely to interfere with a fair trial by an impartial jury. The motion shall not be granted unless the court determines that there is a substantial likelihood of such interference. In determining the motion the court shall consider reasonable alternatives to closing the hearing and the closure shall be no broader than is necessary to protect the overriding interest involved.

Subd. 2. Notice to Adverse Counsel. If, prior to trial, counsel for either the prosecution or the defense has evidence that counsel believes may be the subject of an exclusionary order, counsel has a duty first to advise opposing counsel of that fact and suggest that both counsel meet privately with the presiding judge in closed court and disclose to the court the problem. If counsel for either side refuses to meet with the court, the court may order counsel to be present in closed court.

Subd. 3. Meeting in Closed Court and Notice of Hearing. In closed court the court shall review the evidence outlined by counsel that may be the subject of a restrictive order. If the court feels that any of the proffered evidence may properly be the subject for a restrictive order, the court shall immediately docket a notice of hearing on a motion for a restrictive order made by either counsel or by the court. Such notice shall be docketed at least 24 hours before the hearing and shall be reasonably calculated to afford the public and the news media with an opportunity to be heard on whether the overriding interest claimed justifies closing the hearing to the public and the news media.

Subd. 4. Hearing. At the hearing held pursuant to such notice, the trial court shall advise all present that evidence has been disclosed to it that may be the subject of a closure order and shall give the public and the news media an opportunity to suggest any alternatives to a restrictive order.

Subd. 5. Findings of Fact. No exclusion order shall issue without the court setting forth the reasons therefor in written findings of fact. Such findings must include a review of alternatives to closure and a statement of why the court believes such alternatives are inadequate. Any matter to be decided which does not present the risk of revealing inadmissible, prejudicial information shall be decided openly and on the record.

Subd. 6. Records. Whenever under this rule all or part of any pretrial hearing is closed to the public, a complete record of those proceedings shall be made and upon request shall be transcribed at public expense and filed and shall be available to the public following the completion of the trial or disposition of the case without trial. For the protection of innocent persons, the court may order that names be deleted or substitutions made therefor in the record.

Subd. 7. Appellate Review. Anyone represented at the hearing or aggrieved by an order granting or denying an exclusion or restrictive order under this rule may petition the Court of Appeals for review, which shall be the exclusive method for obtaining review.

The Court of Appeals shall determine upon the hearing record whether the moving party sustained the burden of justifying the order under the conditions specified in this rule, and may reverse, affirm, or modify the order issued.

Comment—Rule 25

See comment following Rule 25.03.

Rule 25.02 Continuance or Change of Venue

A motion for continuance or change of venue because of prejudicial publicity shall be governed by the following rules:

Subd. 1. At Whose Instance. A continuance or change of venue may be granted on motion of either the prosecution or the defense or on the court's initiative.

Subd. 2. Methods of Proof. In addition to the testimony or affidavits of individuals in the community, which shall not be required as a condition of the granting of a motion for continuance or change of venue, qualified public opinion surveys shall be admissible as well as other materials having probative value.

Subd. 3. Standards for Granting the Motion. A motion for continuance or change of venue shall be granted whenever it is determined that the dissemination of potentially prejudicial material creates a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. A showing of actual prejudice shall not be required.

Subd. 4. Time of Disposition. If a motion for continuance or change of venue is made before the jury is sworn, the motion shall be determined before the jury is sworn. If

a motion is made or if reconsideration of a prior denial is sought, it may be granted notwithstanding the fact that a jury has been sworn to try the case.

Subd. 5. Limitations; Waiver. It shall not be ground for denial of a change of venue that one such change has already been granted. The waiver of the right to trial by jury or the failure to exercise all available peremptory challenges shall not constitute a waiver of the right to a continuance or change of venue if a motion has been timely made.

Comment—Rule 25

See comment following Rule 25.03.

Rule 25.03 Restrictive Orders

Except as provided in Rules 25.01, 26.03, subd. 6, and 33.04 the following rule shall govern the issuance of any court order restricting public access to public records relating to a criminal proceeding:

Subd. 1. Motion and Notice.

(a) A restrictive order may be issued only upon motion and after notice and hearing.

(b) Notice of the hearing shall be given in the time and manner and to such interested persons, including the news media, as the court may direct, provided that the notice shall be docketed at least 24 hours before the hearing and shall be reasonably calculated to afford the public and the news media with an opportunity to be heard on the matter.

Subd. 2. Hearing.

(a) At the hearing, the moving party shall have the burden of establishing a factual basis for the issuance of the order under the conditions specified in subd. 3.

(b) The public and news media shall have a right to be represented at the hearing and to present evidence and arguments in support of or in opposition to the motion and to suggest any alternatives to the restrictive order.

(c) A verbatim record shall be made of the hearing.

Subd. 3. Grounds for Restrictive Order. The court may issue a restrictive order under this rule only if the court concludes on the basis of the evidence presented at the hearing that:

(a) Access to such public records will present a substantial likelihood of interfering with the fair and impartial administration of justice.

(b) All reasonable alternatives to the restrictive order are inadequate.

The restrictive order shall be no broader than is necessary to protect against the potential interference with the fair and impartial administration of justice.

Subd. 4. Findings of Fact. The Court shall make written findings of the facts and statement of the reasons supporting the conclusions upon which an order granting or denying the motion is based. If the restrictive order is granted, the findings of fact shall

include a review of the alternatives to the restrictive order and a statement of why the Court believes such alternatives to be inadequate.

Subd. 5. Appellate Review.

(a) Anyone represented at the hearing or aggrieved by an order granting or denying a restrictive order may petition the Court of Appeals for review, which shall be the exclusive method for obtaining review.

(b) The Court of Appeals shall determine upon the hearing record whether the moving party sustained the burden of justifying the restrictive order under the conditions specified in subd. 3 of this rule, and the Court of Appeals may reverse, affirm, or modify the order issued.

Comment—Rule 25

This rule prescribes special rules to be applied in the case of potentially prejudicial publicity. Other applicable rules when this question arises are Rules 26.01, subd. 1(2)(b) (Waiver of Jury Trial); 26.02, subd. 4(2)(b) (Sequestration of Jurors on Voir Dire); 26.03, subd. 3 (Use of Courtroom); 26.03, subd. 5(1) (Sequestration of Jury); 26.03, subd. 6 (Exclusion of Public from Hearings or Arguments Outside Presence of the Jury); 26.03, subd. 7 (Cautioning Parties, Witnesses, Jurors, and Judicial Employees; Sequestration of Witnesses); 26.03, subd. 8 (Admonitions to Jurors); and 26.03, subd. 9 (Questioning Jurors about Exposure to Prejudicial Material). See also Comment to Rule 26.04 (Post-Verdict Motions).

The Rules of Public Access to Records of the Judicial Branch, effective July 1, 1988, generally govern access to case records of all judicial courts. However, Rule 4, subd. 1(d) and Rule 4, subd. 2 of those rules provide that the Rules of Criminal Procedure shall govern what criminal case records are inaccessible to the public and the procedure for restraining access to those records. As to those restrictions see Rule 25.01 (pretrial hearing closure); Rule 25.03 (restricting access to public records relating to a criminal proceeding); Rule 26.03, subd. 6 (exclusion from proceedings outside the hearing of the jury); and Rule 33.04 (delay in filing of complaint, indictment, application, or affidavit requesting a warrant).

Rule 25.01 (Pretrial Hearings--Motion to Exclude Public) setting forth the procedure and standard for excluding the public from pretrial hearings is based on Minneapolis Star and Tribune Company v. Kammeyer, 341 N.W.2d 550 (Minn.1983). The motion to exclude the public from pretrial hearings under this rule shall not be granted unless the court determines that there is a substantial likelihood of interference with an overriding interest. For a defendant that would include interference with the defendant's right to a fair trial by reason of the dissemination of evidence or argument adduced at the hearing. As to the sufficiency of the alleged overriding interest to justify closure of the hearing see Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (Closure of suppression hearing over the defendant's objection), Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (Closure of voir dire proceedings), and Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (Closure of courtroom when the minor victim of a sex offense testifies). This determination would include the situation in which the news media agreed not to disseminate these matters until completion of the trial. The provision for appellate review is intended to give the defendant, as well as any person aggrieved,

standing to seek immediate review of the court's ruling on exclusion.

Whenever the public is excluded, a record of the proceedings shall be kept and made available to the public following the completion of the trial or disposition of the case without trial. For the protection of innocent persons, the court may order that names be deleted or substitutions be made.

This rule does not interfere with the power of the court in any pretrial hearing to caution those present that dissemination of certain information by means of public communication may jeopardize the right to a fair trial by an impartial jury.

Rule 25.02. Motion for Continuance or Change of Venue.

Rule 25.02, subd. 1 and subd. 2 (At Whose Instance; Methods of Proof) are taken from ABA Standards, Fair Trial and Free Press, 3.2(a)(b) (Approved Draft, 1968). Rule 25.02, subd. 3 (Standards for Granting the Motion) is based upon ABA Standards, Fair Trial and Free Press 3.2(c) (Approved Draft, 1968). The determination that there is a reasonable likelihood a fair trial cannot be had may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the prejudicial material involved. Rule 25.02, subd. 4 (Time of Disposition of Motion) is based on ABA Standards, Fair Trial and Free Press, 3.2(d) (Approved Draft, 1968). A motion for continuance or change of venue should, if possible, be made at the time prescribed by Rule 10 for pretrial motions and heard at the Omnibus Hearing under Rule 11. Under Rule 25.02, subd. 4, the motion may be made before the jury is sworn and in that event should be determined before the jury is sworn. If a motion is made or reconsideration of a prior denial is sought, however, it may be granted after the jury is sworn. Since the Fifth Amendment's double jeopardy provisions are applicable to the states [Benton v. Maryland, 89 S.Ct. 2056, 395 U.S. 784, 23 L.Ed.2d 707 (1969)], jeopardy attaches in a jury case when the jury is sworn and in a court trial when the first evidence is presented to the court. See Minn. Stat. § 611A.033 regarding the prosecutor's duties under the Victim's Rights Act to make reasonable efforts to provide advance notice of any continuance of the proceedings.

Rule 25.02, subd. 5 (Limitations; Waiver) is taken from ABA Standards, Fair Trial and Free Press, 3.2(e) (Approved Draft, 1968) and expressly permits more than one change of venue. (This changes Minn. Stat. § 627.01 which allows the defendant only one change of venue.)

It is anticipated that Rule 25.03 will be utilized only "in exceptional cases" involving serious crimes. See Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254, 257, and note 7 (Minn.1977). The procedure required by this rule is based upon Minneapolis Star and Tribune Company v. Kammeyer, 341 N.W.2d 550 (Minn.1983) as well as Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254 (Minn.1977). A restrictive order may be issued under Rule 25.03 only if the Court finds that access to the records will present a substantial likelihood of interfering with the fair and impartial administration of justice. This standard is similar to that provided by Rule 25.01 governing closure of pretrial hearings and Rule 26.03, subd. 6 governing closure of trial proceedings. A more restrictive standard governing access to such records would be anomalous in light of Rule 25.01 and Rule 26.03, subd. 6. Rule 25.03 governs only the restriction of access to public records concerning a criminal case. It does not authorize

the court under any circumstances to prohibit the news media from broadcasting or publishing any information in their possession relating to a criminal case. This is in accord with ABA Standards, Fair Trial and Free Press, 8-3.1 (Approved Draft, 1982) which recommends that no rule of court be promulgated authorizing any such restrictions. The requirement in Rule 25.03, subd. 3 that any restrictive order be no broader than necessary is taken from Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

Possible alternatives to a restrictive order indicated in Rule 25.03, subd. 3(b) are the following:

A continuance or change of venue under Rule 25.02; sequestration of jurors on voir dire under Rule 26.02, subd. 4(2)(b); regulation of use of the courtroom under Rule 26.03, subd. 3; sequestration of jury under Rule 26.03, subd. 5(1); exclusion of the public from hearings or arguments outside the presence of the jury under Rule 26.03, subd. 6; cautioning or ordering parties, witnesses, jurors, and judicial employees and sequestration of witnesses under Rule 26.03, subd. 7; admonitions to jurors about exposure to prejudicial material under Rule 26.03, subd. 9.

Rule 26. Trial

Rule 26.01 Trial by Jury or by the Court

Subd. 1. Trial by Jury.

(1) Right to Jury Trial.

(a) Offenses Punishable by Incarceration. A defendant shall be entitled to a jury trial in any prosecution for an offense punishable by incarceration. All trials shall be in the district court.

(b) Misdemeanors Not Punishable by Incarceration. In any prosecution for the violation of a misdemeanor not punishable by incarceration, trial shall be to the court.

(2) Waiver of Trial by Jury.

(a) Waiver on the Issue of Guilt. The defendant, with the approval of the court may waive jury trial on the issue of guilt provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

(b) Waiver on the Issue of an Aggravated Sentence. Where an aggravated sentence is sought by the prosecution, the defendant, with the approval of the court, may waive jury trial on the facts in support of an aggravated sentence provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to a trial by jury and after having had an opportunity to consult with counsel.

(c) Waiver When Prejudicial Publicity. The defendant shall be permitted to waive jury trial whenever it is determined that (a) the waiver has been knowingly and voluntarily made, and (b) there is reason to believe that, as the result of the dissemination of potentially prejudicial material, the waiver is required to assure the likelihood of a fair trial.

(3) Withdrawal of Waiver of Jury Trial. Waiver of jury trial may be withdrawn by the defendant at any time before the commencement of trial.

(4) Waiver of Number of Jurors Required by Law. At any time before verdict,

the parties, with the approval of the court, may stipulate that the jury shall consist of a lesser number than that provided by law. The court shall not approve such a stipulation unless the defendant, after being advised by the court of the right to trial by a jury consisting of the number of jurors provided by law, personally in writing or orally on the record in open court agrees to trial by such reduced jury.

(5) Number Required for Verdict. A unanimous verdict shall be required in all cases.

(6) Waiver of Unanimous Verdict. At any time before verdict, the parties, with the approval of the court, may stipulate that the jury may render a verdict on the concurrence of a specified number of jurors less than that required by law or these rules. The court shall not approve such a stipulation unless the defendant, after being advised by the court of the right to a verdict on the concurrence of the number of jurors specified by law, personally in writing or orally on the record waives the right to such a verdict.

Subd. 2. Trial Without a Jury. In a case tried without a jury, the court, within 7 days after the completion of the trial, shall make a general finding of guilty, not guilty, or if such pleas have been made, a general finding of not guilty by reason of mental illness or mental deficiency, double jeopardy, or that prosecution is barred by Minn. Stat. § 609.035 (1971), if appropriate. The court, within 7 days after the general finding in felony and gross misdemeanor cases, shall in addition specifically find the essential facts in writing on the record. In misdemeanor and petty misdemeanor cases, such findings shall be made within 7 days after the filing of the notice of appeal. If an opinion or memorandum of decision is filed, it is sufficient if the findings of fact appear therein. If the court omits a finding on any issue of fact essential to sustain the general finding, it shall be deemed to have made a finding consistent with the general finding.

Subd. 3. Trial on Stipulated Facts. By agreement of the defendant and the prosecuting attorney, a determination of defendant's guilt, or the existence of facts to support an aggravated sentence, or both, may be submitted to and tried by the court based on stipulated facts. Before proceeding in this manner, the defendant shall acknowledge and waive the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant's presence, to question those prosecution witnesses, and to require any favorable witnesses to testify for the defense in court. The agreement and the waiver shall be in writing or orally on the record. If this procedure is utilized for determination of defendant's guilt and the existence of facts to support an aggravated sentence, there shall be a separate waiver as to each issue. Upon submission of the case on stipulated facts, the court shall proceed as on any other trial to the court pursuant to subdivision 2 of this rule. If the defendant is found guilty based on the stipulated facts, the defendant may appeal from the judgment of conviction and raise issues on appeal the same as from any trial to the court.

Subd. 4. Stipulation to Prosecution's Case to Obtain Review of a Pretrial Ruling. When the parties agree that the court's ruling on a specified pretrial issue is dispositive of the case, or that the ruling otherwise makes a contested trial unnecessary, the following procedure shall be used to preserve the issue for appellate review. The defendant shall maintain the plea of not guilty. The defendant and the prosecuting attorney shall acknowledge that the pretrial issue is dispositive, or that a trial will otherwise be unnecessary if the defendant prevails on appeal. The defendant, after an opportunity to consult with counsel, shall waive the right to a jury trial under Rule 26.01, subdivision 1(2)(a), and shall also waive the rights specified in Rule 26.01, subdivision 3. The defendant shall stipulate to the prosecution's evidence in a trial to the court, and

acknowledge that the court will consider the prosecution's evidence and may find the defendant guilty based on that evidence. The defendant shall also acknowledge that appellate review will be of the pretrial issue, but not of the defendant's guilt, or of other issues that could arise at a contested trial. The defendant and the prosecuting attorney must make the foregoing acknowledgments personally, in writing or orally on the record. The court after consideration of the stipulated evidence shall make an appropriate finding, and if that finding is guilty, the court shall also make findings of fact, orally on the record or in writing, as to each element of the offense(s).

Comment—Rule 26

See comment following Rule 26.04.

Rule 26.02 Selection of Jury

Subd. 1. Selection and Qualifications. The jury list shall be composed of the names of persons selected at random from a fair cross-section of the residents of the county who are qualified by law to serve as jurors and shall otherwise be selected as provided by law. The jury shall be drawn from the jury list and summoned, as prescribed by law.

Subd. 2. Juror Information.

(1) List of Prospective Jurors. Upon request the clerk of court shall furnish the parties with a list of the names and addresses of the persons on the jury panel and such other information as the clerk of court has obtained from the prospective jurors, unless otherwise ordered by the trial court after a hearing in accordance with this rule.

(2) Anonymous Jurors. Upon the motion of a party that there is a special need to restrict the parties' access to names, addresses, telephone numbers, and other identifying information of prospective and selected jurors, the court shall hold a hearing on the motion. The court may order that the parties' and the public's access to this information about the prospective jurors be restricted only if it determines that in the individual case there is a strong reason to believe that the jury needs protection from external threats to its members' safety or impartiality. The court order may restrict access to such information during jury selection, trial and later for so long as such protection is necessary. Jurors and prospective jurors may be identified by number or by other method that protects their identity. If the court restricts access to this information, the court must also take reasonable precautions to minimize any possible prejudicial effect the restriction on access to this information might have on the defendant or the state.

The court shall make clear and detailed findings of fact in writing or on the record in open court supporting its determination that the restriction on access to information about the prospective and selected jurors is necessary for their safety or impartiality.

(3) Jury Questionnaire. As a supplement to oral voir dire, a sworn jury questionnaire designed for use in criminal cases may be used to obtain information helpful to the parties and the court in jury selection before the jurors are called into court for examination. The court may on its own initiative or on request of counsel include in the questionnaire additional questions that may elicit sensitive information. If sensitive

questions are included, the prospective jurors shall be advised that instead of answering any particular sensitive questions in writing they may request an opportunity to address the court in camera, with counsel and the defendant present, concerning their desire that their answers to any particular sensitive questions not be public. When such a request is made by a prospective juror, the court shall proceed under Rule 26.02, subd. 4(4) and decide whether the particular sensitive questions may be answered during oral voir dire with the public excluded. Court personnel may hand out the questionnaire to the prospective jurors and collect them when completed. The court shall make the completed questionnaires available to counsel.

Subd. 3. Challenge to Panel. Either party may challenge the jury panel on the ground that there has been a material departure from the requirements of law governing the selection, drawing or summoning of the jurors. The challenge shall be in writing, specifying the facts constituting the grounds of the challenge, and shall be made before a jury is sworn. If the opposing party objects to either the sufficiency of the challenge or the facts on which it is based, the court shall hear and determine the challenge.

Subd. 4. Voir Dire Examination.

(1) Purpose--By Whom Made. A voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an informed exercise of peremptory challenges, and shall be open to the public except upon order of the court as provided by Rule 26.02, subd. 4(4). The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge shall then put to the prospective juror or jurors any questions which the judge thinks necessary touching their qualifications to serve as jurors in the case on trial and may give such preliminary instructions as are set forth in Rule 26.03, subd. 4. Before exercising challenges, either party may make a reasonable inquiry of a prospective juror or jurors in reference to their qualifications to sit as jurors in the case. A verbatim record of the voir dire examination shall be made at the request of either party.

(2) Sequestration of Jurors.

(a) Court's Discretion. In the discretion of the court the examination of each juror may take place outside of the presence of other chosen and prospective jurors.

(b) Prejudicial Publicity. Whenever there is a significant possibility that individual jurors will be ineligible to serve because of exposure to prejudicial material, the examination of each juror with respect to the juror's exposure shall take place outside the presence of other chosen and prospective jurors.

(3) Order of Drawing, Examination and Challenge.

(a) Uniform Rule. Except as provided by Rule 26.02, subd. 4(3)(c)8 with respect to cases of first degree murder, unless the court orders that the jurors shall be drawn, examined and challenged as provided either by Rule 26.02, subd. 4(3)(b) or (c), they shall be drawn, examined and challenged as follows:

1. The court shall first direct that such a number of the members of the jury panel be drawn and called as will equal the number of which the jury shall be composed for trial of the case plus the number of peremptory challenges available to all the parties and the number of any alternate jurors.

2. The prospective jurors so drawn and called shall take their place in the jury box and be sworn to answer truthfully questions asked them relative to their

qualifications to serve as jurors in the case.

3. The prospective jurors shall be examined as to their qualifications, first by the court, then by the parties, commencing with the defendant.

4. A challenge for cause may be made at any time during voir dire by any party. At the close of voir dire any additional challenges for cause shall be made, first by the defense and then by the prosecution.

5. If any prospective juror is challenged and excused for cause another shall be drawn from the jury panel so that the number in the jury box will remain equal to the number initially called.

6. After both parties have had an opportunity to challenge for cause, each, commencing with the defendant, may exercise alternately the peremptory challenges permitted by these rules.

7. When the peremptory challenges have been exercised, the jury shall be selected from the remaining prospective jurors in the order in which they were called until the number selected equals the number of which the jury shall be composed for trial of the case plus the alternate jurors, if any.

(b) By Order of Court. The court may order that the jurors be drawn, examined and challenged as provided by Rule 26.02, subd. 4(3)(b) or (c) as follows:

1. The court shall first direct that such a number of the members of the jury panel be drawn and called as will equal the number of which the jury shall be composed for trial of the case plus the number of any alternate jurors.

2. The prospective jurors so drawn and called shall take their place in the jury box and be sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the case.

3. The prospective jurors shall be examined as to their qualifications, first by the court, then by the parties, commencing with the defendant.

4. Upon completion of defendant's examination of a prospective juror, the defendant shall be permitted to exercise a challenge for cause or a peremptory challenge as permitted by these rules as to that juror. A juror who is excused shall be replaced by another member of the panel. The replacement juror shall be examined and challenged after all previously drawn jurors have been examined and challenged.

5. Upon completion of the examination and any challenge of each prospective juror by the defendant, the state may examine such prospective juror and may challenge the juror for cause or peremptorily. A juror who is excused shall be replaced by another member of the panel who shall be subject to examination and challenge in accordance with this rule.

6. This process of jury selection shall continue until the number of persons of which the jury shall be composed for trial of the case plus any alternate jurors is selected and sworn as the trial jury.

(c) By Order of Court.

1. The court shall direct that one prospective juror at a time be drawn from the jury panel for examination.

2. The prospective juror so drawn shall be sworn to answer truthfully questions asked relative to the prospective juror's qualifications to serve as a juror in the case.

3. The prospective juror shall be examined by the court and then by the parties, commencing with the defendant.

4. Upon completion of defendant's examination, the defendant may challenge the juror for cause or peremptorily as permitted by these rules.

5. If the juror is excused, another prospective juror shall be drawn from the panel and shall be examined and subject to challenge in the same manner.

6. A prospective juror who is not excused after examination by the defendant may be examined by the state and may be challenged for cause or peremptorily by the state.

7. This process of selection shall continue until the number of persons of which the jury shall be composed for trial of the case is selected and sworn as the trial jury plus the number of any alternate jurors.

8. In cases of first degree murder, the method provided by Rule 26.02, subd. 4(3)(c) shall be preferred unless otherwise ordered by the court.

(4) Exlcusion of the Public From Voir Dire. In those rare cases where it is necessary, the following rules shall govern the issuance of any court orders excluding the public from any part of the voir dire or restricting access to such orders or to transcripts of any parts of the voir dire closed to the public.

(a) Advisory. When it appears that prospective jurors during voir dire may be asked sensitive questions that could be embarrassing to them, the court may on its own initiative or on request of the defense or the prosecution, advise the prospective jurors that they may request an opportunity to address the court in camera, with counsel and defendant present, concerning their desire to exclude the public from voir dire when the sensitive questions are asked.

(b) In Camera Hearing. If a prospective juror requests an opportunity to address the court in camera concerning exclusion of the public from voir dire during sensitive questioning, the court shall conduct an in camera hearing on that issue on the record with counsel and the defendant also present. The court shall consider at the hearing whether there are any reasonable alternatives to closing voir dire.

(c) Standards. In considering the request to exclude the public during voir dire, the court shall balance the juror's privacy interests, the defendant's right to a fair and public trial, and the public's interest in access to the courts. The court may order closure of voir dire only if it finds that there is a substantial likelihood that conducting the voir dire in open court would interfere with an overriding interest, including the defendant's interest in a fair trial and the juror's legitimate privacy interests in not disclosing deeply personal matters to the public. Any closure of voir dire shall be no broader than is necessary to protect the overriding interests involved.

(d) Refusal to Close Voir Dire. If the court determines that there is no overriding interest to justify excluding the public from voir dire, the voir dire shall continue in open court on the record and upon request the in camera proceeding shall be transcribed and filed with the court administrator within a reasonable time.

(e) Closure of Voir Dire. If the court determines that overriding interests justify closure of any part of the voir dire, that part of the voir dire shall be conducted in camera on the record with counsel and the defendant present.

(f) Findings of Fact. No order excluding the public from any part of the voir dire shall issue without the court setting forth the reasons therefor either in writing or orally on the record. The findings shall indicate why the defendant's right to a fair trial and the jurors' interests in privacy would be threatened by an open voir dire and shall also include a review of alternatives to closure and a statement of why the court believes such alternatives are inadequate.

(g) Record. Whenever under this rule in camera proceedings are held on a juror's request for closure or the public is excluded from any part of the voir dire, a complete record of the proceedings shall be made. Upon request, the record shall be transcribed within a reasonable time and shall be filed with the court administrator. The transcript shall be available to the public, but only if such disclosure can be accomplished while safeguarding the overriding interests involved. The court may order that the transcript or any part of it be sealed, that the

name of a juror be withheld, or parts of the transcript be excised if the court finds that it is necessary to do so to protect the overriding interests involved.

Subd. 5. Challenge for Cause.

(1) Grounds. A juror may be challenged for cause by either party upon the following grounds:

1. The existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the party challenging.

2. A felony conviction unless the juror's civil rights have been restored.

3. The lack of any of the qualifications prescribed by law to render a person a competent juror.

4. A physical or mental defect which renders the juror incapable of performing the duties of a juror.

5. The consanguinity or affinity, within the ninth degree, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant, or to any of the attorneys in the case.

6. Standing in relation of guardian and ward, attorney and client, employer and employee, landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense, or on whose complaint the prosecution was instituted.

7. Being a party adverse to the defendant in a civil action, or having complained against, or been accused by the defendant, in a criminal prosecution.

8. Having served on the grand jury which found the indictment, or an indictment on a related offense.

9. Having served on a trial jury which has tried another person for the same or a related offense to that charged in the indictment, complaint, tab charge or a related indictment, complaint or tab charge.

10. Having been a member of a jury formerly sworn to try the same indictment, complaint, tab charge or a related indictment, complaint or tab charge.

11. Having served as a juror in any case involving the defendant.

(2) How and When Exercised. A challenge for cause may be oral and shall state the grounds on which it is based. The challenge shall be made before the juror is sworn to try the case, but the court for good cause shown may permit it to be made after the juror is sworn but before all the jurors constituting the jury are sworn. If a challenge for cause is made and the court sustains the challenge, the juror shall be excused.

(3) By Whom Tried. If the opposing party objects to the sufficiency of a challenge for cause or the facts on which it is based, all issues of law or fact arising upon the challenge shall be tried and determined by the court.

Subd. 6. Peremptory Challenges. If the offense charged is punishable by life imprisonment the defendant shall be entitled to 15 and the state to 9 peremptory challenges. For any other offense, the defendant shall be entitled to 5 and the state to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly, and in that event the state's peremptory challenges shall be correspondingly increased. All peremptory challenges shall be exercised out of the hearing of the jury panel.

Subd. 6a. Objections to Peremptory Challenges.

(1) Rule. No party may engage in purposeful discrimination on the basis of either race or gender in the exercise of peremptory challenges.

(2) Procedure. Any party, or the court, may object to the exercise of a peremptory challenge on the ground of purposeful racial or gender discrimination at any time before the jury is sworn to try the case. The objection and all arguments thereon shall be heard out of the hearing of the jury panel and the individual jury panel member involved. A record shall be made of all proceedings upon the objection. All issues of law or fact arising upon the objection shall be tried and determined by the court as promptly as possible, but in all events it shall be done before the jury is sworn to try the case.

(3) Determination. The trial court shall use a three-step process for evaluating a claim that any party has engaged in purposeful racial or gender discrimination in the exercise of its peremptory challenges:

(a) First, the party making the objection must make a prima facie showing that the responding party has exercised its peremptory challenges on the basis of race or gender. If the objection was raised by the court on its own initiative then the court must initially determine, after such hearing as it deems appropriate, that there is a prima facie showing that the responding party has exercised its peremptory challenges on the basis of race or gender. If no prima facie showing is found, the objection shall be overruled.

(b) Second, if the court determines that a prima facie showing has been made, the responding party must articulate a race-neutral or gender-neutral explanation, as applicable, for exercising the peremptory challenge(s) in question. If no race-neutral or gender-neutral explanation is articulated, the objection shall be sustained.

(c) Third, if the court determines that a race-neutral or gender-neutral explanation has been articulated, the objecting party, must prove that the proffered explanation is pretextual. If the objection was initially raised by the court, it shall determine, after such hearing as it deems appropriate, whether the peremptory challenge was exercised in a purposeful discriminatory manner on the basis of race or gender. If purposeful discrimination is proved the objection shall be sustained. If no purposeful discrimination is proved the objection shall be overruled.

(4) Remedies. If the objection is overruled the jury panel member against whom the peremptory challenge was exercised shall be excused. If the objection is sustained, the court shall do either of the following based upon its determination of what the interests of justice and a fair trial to all parties in the case require:

(a) Disallow the discriminatory peremptory challenge and resume jury selection with the challenged jury panel member reinstated on the panel; or

(b) Discharge the entire jury panel and select a new jury from a jury panel not previously associated with the case.

Subd. 7. Order of Challenges to the Panel and to Individual Jurors. Challenges to the panel and to individual jurors shall be made in the following order:

a. To the panel.
b. To an individual juror for cause.
c. Peremptory challenge to an individual juror.

Subd. 8. Alternate Jurors. A trial judge may impanel alternate or additional jurors whenever in the judge's discretion, the judge believes it advisable to have such

jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. Alternate jurors, in the order in which they are called, shall replace jurors who prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, and be subject to the same examination and challenges for cause as the regular jurors. No additional peremptory challenges shall be allowed for alternate jurors except that unused peremptory challenges for the regular jury may be exercised against alternate jurors. If a juror becomes unable or disqualified to perform a juror's duties after the jury has retired to consider its verdict, a mistrial shall be declared unless the parties agree pursuant to Rule 26.01, subd. 1(4) that the jury shall consist of a lesser number than that selected for the trial.

Comment—Rule 26

See comment following Rule 26.04.

Rule 26.03 Procedures During Trial

Subd. 1. Presence of Defendant.

(1) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. If the defendant is handicapped in communication, a qualified interpreter for that defendant shall also be present at each of these proceedings.

(2) Continued Presence Not Required. The further progress of a trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to waive the right to be present whenever:

1. a defendant voluntarily and without justification absents himself or herself after trial has commenced; or

2. a defendant after warning engages in conduct which is such as to justify being excluded from the courtroom because it tends to interrupt the orderly procedure of the court and the due course of the trial. As an alternative to exclusion, the court may use all such methods of restraint as will ensure the orderly procedure of the court and the due course of the trial.

(3) Presence Not Required. A defendant need not be present in the following situations:

1. a corporation may appear by counsel for all purposes;

2. in the case of felonies and gross misdemeanors, on defendant's motion, the court may excuse the defendant from attendance at any proceeding except arraignment, plea, trial, and imposition of sentence; and

3. in prosecutions for misdemeanors, the court shall permit arraignment and plea in the defendant's absence if the court is satisfied that the defendant has knowingly and voluntarily waived the right to be present. The court with the written consent of the defendant, or the defendant's oral consent in open court, may permit trial, and imposition of sentence in the defendant's absence.

4. The court in its discretion and upon agreement of the defendant may allow the participation by telephone of one or more parties, counsel, or the judge in any

proceedings in which the defendant would otherwise be permitted to waive personal appearance under these rules.

Subd. 2. Custody and Restraint of Defendants and Witnesses.

a. During the trial the defendant shall be seated so as to effectively consult with defense counsel and to see and hear the proceedings.

b. An incarcerated defendant or witness shall not appear in court in the distinctive attire of a prisoner.

c. Defendants and witnesses shall not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order or security. A trial judge who orders such restraint, shall state the reasons on the record outside the presence of the jury. Whenever physical restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge shall on request of the defendant instruct those jurors that such restraint is not to be considered in assessing the proof and determining guilt.

Subd. 3. Use of Courtroom. Whenever appropriate in view of the notoriety of the case or the number or conduct of news media representatives present at any judicial proceeding, the court shall ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom and other facilities of the court, the assignment of seats to news media representatives on an equitable basis, and other matters that may affect the conduct of the proceeding.

Subd. 4. Preliminary Instructions. After the jury has been impaneled and sworn, and before the opening statements of counsel, the court may instruct the jury as to the respective claims of the parties and as to such other matters as will aid the jury in comprehending the trial procedure and sequence to be followed. Preliminary instructions may also include such matters as burden of proof, presumption of innocence, the necessity of proof of guilt beyond a reasonable doubt, the elements which the jury may consider in weighing testimony or determining credibility of witnesses, rules applicable to opinion evidence, and such other rules of law, including the essential elements of the offense, as the court may deem essential to the proper understanding of the evidence. Such preliminary instructions shall be disclosed to the parties before they are given and either party may object to any specific instruction or propose other instructions to be given prior to trial.

Subd. 5. Sequestration of the Jury.

(1) In the Discretion of the Court. During the period from the time the jurors are sworn until they retire for deliberation upon their verdict, the court, in its discretion, may either permit them and any alternate jurors to separate during recesses and adjournments or direct that they be continuously kept together during such period under the supervision of proper officers. With the consent of the defendant and the prosecution, the court, in its discretion, may allow the jurors to separate over night during deliberation. The officers shall not speak to or communicate with any juror concerning any subject connected with the trial nor permit any other person to do so, and shall return the jury to the courtroom at the next designated trial session.

(2) On Motion. Either party may move for sequestration of the jury at the beginning of trial or at any time during the course of the trial. Sequestration shall be ordered if it is determined that the case is of such notoriety or the issues are of such a

nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors. Whenever sequestration is ordered, the court in advising the jury of the decision shall not disclose which party requested sequestration.

Subd. 6. Exclusion of the Public From Hearings or Arguments Outside the Presence of the Jury. The following rules shall govern the issuance of any court order excluding the public from any portion of the trial that takes place outside the presence of the jury and restricting access to any transcripts or orders developed from such closed portions of the trial.

(1) Grounds for Exclusion of Public. If the jury is not sequestered, the court on its initiative or on motion of the defendant or the prosecuting attorney may order that the public be excluded from any portion of the trial that takes place outside the presence of the jury on the ground that dissemination of evidence or argument adduced at the hearing may interfere with an overriding interest including that it is likely to interfere with a fair trial by an impartial jury. The motion shall not be granted unless it is determined that there is a substantial likelihood of such interference. In determining the motion the court shall consider reasonable alternatives to closing such portion of the trial and the closure shall be no broader than is necessary to protect the overriding interest involved.

(2) Notice to Adverse Counsel. If, during trial, counsel for either the prosecution or the defense has evidence that counsel believes may be the subject of an exclusionary order, counsel has a duty first to advise opposing counsel of that fact and suggest that both counsel meet privately with the presiding judge in closed court and disclose to the court the problem. If counsel for either side refuses to meet with the court, the court may order counsel to be present in closed court.

(3) Meeting in Closed Court and Notice of Hearing. In closed court the court shall review the evidence outlined by counsel that may be the subject of a restrictive order. If the court feels that any of the proffered evidence may properly be the subject for a restrictive order, the court shall immediately docket a notice of hearing on the court's initiative or on a motion for a restrictive order made by either counsel. Such notice shall be docketed at least 24 hours before the hearing and shall be reasonably calculated to afford the public and the news media with an opportunity to be heard on whether the overriding interest claimed justifies closing the hearing to the public and the news media.

(4) Hearing. At the hearing held pursuant to such notice, the trial court shall advise all present that evidence has been disclosed to it that may be the subject of a closure order and shall give the public and the news media an opportunity to suggest any alternatives to a restrictive order.

(5) Findings of Fact. No exclusion order shall issue without the court setting forth the reasons therefor in written findings of fact. Such findings must include a review of alternatives to closure and a statement of why the court believes such alternatives are inadequate. Any matter to be decided which does not present the risk of revealing inadmissible, prejudicial information shall be decided openly and on the record.

(6) Records. Whenever under this rule part of the proceedings are closed to the public, a complete record of those proceedings shall be made and upon request shall be transcribed at public expense and filed and shall be available to the public following the completion of the trial. For the protection of innocent persons, the court may order that names be deleted or substitutions therefor be made in the record.

(7) Appellate Review. Anyone represented at the hearing or aggrieved by an order granting or denying an exclusion or restrictive order under this rule may petition the Court of Appeals for review, which shall be the exclusive method for obtaining review.

The Court of Appeals shall determine upon the hearing record whether the

moving party sustained the burden of justifying the order under the conditions specified in this rule, and may reverse, affirm, or modify the order issued.

Subd. 7. Cautioning Parties, Witnesses, Jurors and Judicial Employees; Insulating Witnesses. Whenever appropriate, the court shall order attorneys, parties, witnesses, jurors, and employees and officers of the court not to make extra-judicial statements relating to the case or the issues in the case for dissemination by any means of public communication during the course of the trial.

Witnesses may be sequestered or excluded from the courtroom, prior to their appearance, in the discretion of the court.

Subd. 8. Admonitions to Jurors. Appropriate admonitions shall be given to the jury during the trial not to read, listen to, or watch reports about the case appearing in the news media.

Subd. 9. Questioning Jurors About Exposure to Potentially Prejudicial Material in the Course of a Trial. If it is determined that material disseminated outside the trial proceedings raises serious questions of possible prejudice, the court may on its initiative and shall on motion of either party question each juror, out of the presence of the others, about the juror's exposure to that material. The examination shall take place in the presence of counsel, and a verbatim record of the examination shall be kept.

Subd. 10. View by Jury.

a. When the court is of the opinion that a viewing by the jury of the place where the offense being tried was committed, or any other place involved in the case, will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the closing arguments, order that the jury be conducted to such place.

b. The jury must be kept together during the viewing under the supervision of a proper officer appointed by the court. The judge and a court reporter must be present, and with the judge's permission any other person may be present. The prosecuting attorney, the defendant and defense counsel may as a matter of right be present, but the right may be waived.

c. The purpose of the viewing shall be solely to permit visual observation by the jury of the place in question, and neither the parties, counsel, nor the jurors while viewing the place may engage in discussion concerning the significance or implications of anything under observation or concerning any issue in the case.

Subd. 11. Order of Jury Trial. The order of a jury trial shall be substantially as follows:

a. The jury shall be selected and sworn.

b. The court may deliver preliminary instructions to the jury.

c. The prosecuting attorney may make an opening statement to the jury, confining the statement to the facts the prosecuting attorney expects to prove.

d. The defendant may make an opening statement to the jury, or may make it immediately before offering evidence in defense. The statement shall be confined to a statement of the defense and the facts the defendant expects to prove in support thereof.

e. The prosecution shall offer evidence in support of the indictment, complaint or tab charge.

f. The defendant may offer evidence in defense.

g. The prosecution may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the prosecution's rebuttal evidence. In the interests of justice, the court may permit either party to offer evidence upon the party's original case.

h. At the conclusion of the evidence, the prosecution may make a closing argument to the jury.

i. The defendant may then make a closing argument to the jury.

j. The prosecution may then make a rebuttal argument to the defense closing argument. The rebuttal must be limited to a direct response to those matters raised in the defendant's closing argument.

k. On the motion of the defendant, the court may permit the defendant to reply in surrebuttal if the court determines that the prosecution has made in its rebuttal argument a misstatement of law or fact or a statement that is inflammatory or prejudicial. The surrebuttal must be limited to a direct response to the misstatement of law or fact or the inflammatory or prejudicial statement.

l. At the conclusion of the arguments the court shall allow the parties an opportunity, outside the presence of the jury and on the record, to make any objections they may have to the content or manner of the other party's argument based upon existing law and to request curative instructions. This rule does not limit the right of any party under existing law to make appropriate objections and to seek curative instructions at any other time during the closing argument process.

m. The court shall charge the jury.

n. The jury shall retire for deliberation and, if possible, render a verdict.

Subd. 12. Note Taking. Jurors may take notes of the evidence presented at the trial and may keep these notes with them when they retire for deliberation.

Subd. 13. Substitution of Judge.

(1) Before or During Trial. If by reason of death, sickness or other disability, the judge before whom pretrial proceedings or a jury trial has commenced is unable to proceed, any other judge sitting in or assigned to the court, upon certification of familiarity with the record of the proceedings or trial, may proceed with and finish the proceedings or trial.

(2) After Verdict or Finding of Guilt. If by reason of absence, death, sickness or other disability, the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that those duties cannot be performed because of not presiding at the trial, such judge may grant a new trial.

(3) Interest or Bias of Judge. No judge shall preside over a trial or other proceeding if that judge is disqualified under the Code of Judicial Conduct. A request to disqualify a judge for cause shall be heard and determined by the chief judge of the judicial district or the assistant chief judge if the chief judge is the subject of the request.

(4) Notice to Remove. The defendant or the prosecuting attorney may serve on the other party and file with the court administrator a notice to remove the judge assigned to a trial or hearing. The notice shall be served and filed within seven (7) days after the party receives notice of which judge is to preside at the trial or hearing, but not later than the commencement of the trial or hearing. No notice to remove shall be effective against a judge who has already presided at the trial, Omnibus Hearing, or other evidentiary

hearing of which the party had notice, except upon an affirmative showing of cause on the part of the judge. After a party has once disqualified a presiding judge as a matter of right, that party may disqualify the substitute judge only upon an affirmative showing of cause.

(5) Recusal. A judge without a motion may recuse himself or herself from presiding over a trial or other proceeding.

(6) Assignment of New Judge. Upon the removal, disqualification, disability, recusal or unavailability of a judge under this rule, the chief judge of the judicial district shall assign any other judge within the district to hear the matter. If there is no other judge of the district who is qualified to hear the matter, the chief judge of the district shall notify the chief justice. The chief justice shall then assign a judge of another district to preside over the matter.

Subd. 14. Exceptions.

(1) Exceptions Abolished. Exceptions to rulings or orders of the court or to the actions of a party are abolished. It is sufficient that a party, at the time the ruling or order of court is made or sought or the action of a party taken, makes known to the court the action which the party desires the court to take or the party's objections to the action of the court or of a party and the grounds therefor; and, if a party has no opportunity to object to a ruling or order or action at the time it is made or taken the absence of an objection does not thereafter prejudice the party.

(2) Bills of Exception and Settled Cases Abolished. The bill of exceptions and settled case shall not be required. The record of the case for the purposes for which a bill of exceptions or settled case was heretofore required shall consist of the papers filed in the trial court, the offered exhibits, and the minutes of the court, and the transcript of the proceedings, if any.

Subd. 15. Evidence. In all trials the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules. Jurors shall not be permitted to submit questions to any witness, directly or through the court or counsel. If either party offers into evidence a videotape or audiotape exhibit, that party may also provide to the court a transcript of the proposed exhibit which will be made a part of the record.

Subd. 16. Interpreters. The court may appoint an interpreter of its own selection and may fix reasonable compensation for the interpreter. The compensation shall be paid out of funds provided by law. Qualified interpreters appointed by the court for any juror with a sensory disability may be present in the jury room to interpret while the jury is deliberating and voting.

Subd. 17. Motion for Judgment of Acquittal or Insufficiency of Evidence to Support an Aggravated Sentence.

(1) Motions Before Submission to Jury. Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. After the evidence on either side is closed, the court on motion of a defendant or on its initiative shall order the entry of a judgment of acquittal of one or more offenses charged in the tab charge, indictment or complaint if the evidence is insufficient to sustain a conviction of such offense or offenses. The court shall also, on motion of the defendant or on its initiative, order that any grounds for an aggravated sentence be withdrawn from consideration by the jury if the evidence is insufficient.

(2) Reservation of Decision on Motion. If the defendant's motion is made at the close of the evidence offered by the prosecution, the court may not reserve decision of the motion. If the defendant's motion is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict or is discharged without having returned a verdict. If the defendant's motion is granted after the jury returns a verdict of guilty, the court shall make written findings specifying its reasons for entering a judgment of acquittal.

(3) Motion After Discharge of Jury. If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal or insufficiency of evidence to support an aggravated sentence may be made or renewed within 15 days after the jury is discharged or within such further time as the court may fix during the 15-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal, in which case the court shall make written findings specifying its reasons for entering a judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. Such a motion is not barred by defendant's failure to make a similar motion prior to the submission of the case to the jury.

Subd. 18. Instructions.

(1) Requests for Instructions. At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to the arguments to the jury, and such action shall be made a part of the record.

(2) Proposed Instructions. The court may, and upon request of any party shall, before the arguments to the jury, inform counsel what instructions will be given and all such instructions may be stated to the jury by either party as a part of the party's argument.

(3) Objections to Instructions. No party may assign as error any portion of the charge or omission therefrom unless the party objects thereto before the jury retires to consider its verdict. The matter to which objection is made and the grounds of the objection shall be specifically stated. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. All objections to instructions and the rulings thereon shall be included in the record. All instructions, whether given or refused, shall be made a part of the record. An error in the instructions with respect to fundamental law or controlling principle may be assigned in a motion for a new trial though it was not otherwise called to the attention of the court.

(4) Giving of Instructions. The court in its discretion shall instruct the jury either before or after the arguments are completed except, at the discretion of the court, preliminary instructions need not be repeated. The instructions may be in writing and in the discretion of the court a copy may be taken to the jury room when the jury retires for deliberation.

(5) Contents of Instructions. In charging the jury the court shall state all matters of law which are necessary for the jury's information in rendering a verdict and shall inform the jury that it is the exclusive judge of all questions of fact. The court shall not comment on the evidence or the credibility of the witnesses, but may state the respective

claims of the parties.

(6) Verdict Forms. The court shall submit appropriate forms of verdict to the jury for its consideration. Where an aggravated sentence is sought, the court shall submit the issue(s) to the jury by special interrogatory

Subd. 19. Jury Deliberations and Verdict.

(1) Materials to Jury Room. The court shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits which have been received in evidence, or copies thereof, except depositions and may permit a copy of the instructions to be taken to the jury room.

(2) Jury Requests to Review Evidence.

1. If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to re-examine the requested materials admitted into evidence.

2. The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

(3) Additional Instructions After Jury Retires.

1. If the jury, after retiring for deliberation, desires to be informed on any point of law, the jurors, after notice to the prosecutor and defense counsel, shall be conducted to the courtroom. The court shall give appropriate additional instructions in response to the jury's request unless: (a) the jury may be adequately informed by directing their attention to some portion of the original instructions; (b) the request concerns matters not in evidence or questions which do not pertain to the law of the case; or (c) the request would call upon the judge to express an opinion upon factual matters that the jury should determine.

2. The court need not give additional instructions beyond those specifically requested by the jury, but in its discretion the court may also give or repeat other instructions to avoid giving undue prominence to the requested instructions.

3. The court after notice to the prosecutor and defense counsel may recall the jury after it has retired and give any additional instructions as the court deems appropriate.

(4) Deadlocked Jury. The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

(5) Polling the Jury. When a verdict on the issue of guilt is rendered and before the jury has been discharged, the jury shall be polled at the request of any party or upon the court's initiative. When the jury has answered special interrogatories relating to an aggravated sentence, the jury shall be polled at the request of any party or upon the court's initiative as to their answers. The poll(s) shall be conducted by the court or clerk of court who shall ask each juror individually whether the verdict announced is the juror's verdict. If either poll does not conform to the verdict, the jury may be directed to retire for further deliberation or may be discharged.

(6) Impeachment of Verdict. Affidavits of jurors shall not be received in evidence to impeach their verdict. A defendant who has reason to believe that the verdict is subject to impeachment, shall move the court for a summary hearing. If the motion is granted the jurors shall be interrogated under oath and their testimony recorded. The admissibility of evidence at the hearing shall be governed by Rule 606(b) of the

Minnesota Rules of Evidence.

(7) Partial Verdict. The court may accept a partial verdict when the jury has agreed on a verdict on less than all of the charges submitted, but is unable to agree on the remainder.

Comment—Rule 26

See comment following Rule 26.04.

Rule 26.04 Post-Verdict Motions

Subd. 1. New Trial.

(1) Grounds. The court on written motion of the defendant may grant a new trial on the issue of guilt or the existence of facts to support an aggravated sentence, or both, on any of the following grounds:

1. If required in the interests of justice;

2. Irregularity in the proceedings of the court, jury, or on the part of the prosecution, or any order or abuse of discretion, whereby the defendant was deprived of a fair trial;

3. Misconduct of the jury or prosecution;

4. Accident or surprise which could not have been prevented by ordinary prudence;

5. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;

6. Errors of law occurring at the trial, and objected to at the time or, if no objection is required by these rules, assigned in the motion;

7. The verdict or finding of guilty is not justified by the evidence, or is contrary to law.

(2) Basis of Motion. A motion for new trial shall be made and heard on the files, exhibits and minutes of the court. Pertinent facts that would not be a part of the minutes may be shown by affidavit except as otherwise provided by these rules. A full or partial transcript of the court reporter's notes of the testimony taken at the trial or other verbatim recording thereof may be used on the hearing of the motion.

(3) Time for Motion. Notice of a motion for a new trial shall be served within 15 days after verdict or finding of guilty. The motion shall be heard within 30 days after the verdict or finding of guilty, unless the time for hearing be extended by the court within the 30-day period for good cause shown.

(4) Time for Serving Affidavits. When a motion for new trial is based on affidavits, they shall be served with the notice of motion. The opposing party shall have 10 days after such service in which to serve opposing affidavits, which period may be extended by the court upon an order extending the time for hearing under this rule. The court may permit reply affidavits.

Subd. 2. Motion to Vacate Judgment. The court on motion of a defendant shall vacate judgment, if entered, and dismiss the case if the indictment, complaint or tab charge does not charge an offense or if the court was without jurisdiction of the offense charged. The motion shall be made within 15 days after verdict or finding of guilty or after plea of guilty, or within such time as the court may fix during the 15-day period. If

the motion is granted, the court shall make written findings specifying its reasons for vacating the judgment and dismissing the case.

Subd. 3. Joinder of Motions. Any motions for judgment of acquittal or to vacate judgment shall be joined with a motion for a new trial.

Subd. 4. New Trial on Court's Initiative. The court, within 15 days after verdict or finding of guilty, with the consent of the defendant, may order a new trial upon any of the grounds specified in Rule 26.04, subd. 1(1).

Comment—Rule 26

Rule 26.01, subd. 1(1) (Right to Jury Trial). In cases of felonies (Minn. Stat. § 609.02, subd. 2 (1971)) and gross misdemeanors, (Minn. Stat. §§ 609.02, subd. 4, 609.03(2) (1971)) the defendant is entitled to jury trial under Minn.Const. Art. 1, § 6 which guarantees the right to jury trial in "all criminal prosecutions." The term "criminal prosecution" includes prosecutions for all crimes defined by Minn. Stat. § 609.02 (1971). (Peterson v. Peterson, 278 Minn. 275, 153 N.W.2d 825 (1967); State v. Ketterer, 248 Minn. 173, 79 N.W.2d 136 (1956).) The defendant's right to jury trial for offenses punishable by more than six months imprisonment is also guaranteed by the Fourteenth and Sixth Amendments to the United States Constitution. (Duncan v. Louisiana, 391 U.S. 145, 194, 88 S.Ct. 1444, 20 L.Ed.2d 491, 522 (1968); Baldwin v. New York, 399 U.S. 66 (1970).)

Since misdemeanors in Minnesota are punishable by no more than 90 days of incarceration or a fine or both (Minn. Stat. § 609.03, subd. 3) there would usually be no federal constitutional right to a jury trial on a misdemeanor.

There is, however, a state constitutional right to a jury trial in any prosecution for the violation of a misdemeanor statute punishable by incarceration. See Minn. Const. Art. 1, § 6 as interpreted in State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959); State v. Ketterer, 248 Minn. 173, 79 N.W.2d 136 (1956); State ex rel. Erickson v. West, 42 Minn. 147, 43 N.W. 845 (1889); and City of Mankato v. Arnold, 36 Minn. 62, 30 N.W. 305 (1886).

Beyond these constitutional requirements, present statutory law provides for the right to a jury trial at some stage in the proceedings in all prosecutions for the violation of misdemeanors punishable by incarceration. The defendant, however, might not be able to exercise this right to a jury trial until appeal to district court for a trial de novo. As to the right to a jury trial in Hennepin or Ramsey County, either initially or upon a trial de novo in district court, see Minn. Stat. §§ 484.63 (appeals to district court); 488A.10, subd. 6 (appeals from Hennepin County Municipal Court); and 488A.27, subd. 6 (appeals from Ramsey County Municipal Court after January 1, 1975); and State v. Hoben, 256 Minn. 436, 98 N.W.2d 813 (1959) (jury trial in municipal court for traffic ordinance violations).

In county courts governed by Minn. Stat. Ch. 487 (which includes all but Hennepin and Ramsey County) a defendant has a right to a jury trial in any prosecution for the violation of a statutory misdemeanor punishable by incarceration (see Minn. Const. Art. 1, § 6), or of any non-statutory misdemeanor whether or not punishable by incarceration (see Minn. Stat. § 487.25, subd. 6). There is no right to a jury trial in a

prosecution for the violation of a statutory misdemeanor not punishable by incarceration (see Minn. Stat. §§ 169.89, subd. 2 and 633.02).

Under Rule 26.01, subd. 1(1)(a) defendants prosecuted for misdemeanors will have the right to a jury trial if and only if the misdemeanor charged is punishable by incarceration. This will be so whether the misdemeanor is proscribed by statute, ordinance or otherwise, and whether it is a traffic or non-traffic offense. Minn. Stat. §§ 488A.10, subd. 6 (Hennepin County) and 488A.27, subd. 6 (Ramsey County after January 1, 1975) to the extent they provide otherwise are superseded. Also, Minn. Stat. § 487.24, subd. 6, to the extent it might be interpreted to permit a jury trial in a prosecution for the violation of a misdemeanor not punishable by incarceration is superseded. It is the opinion of the Advisory Committee that there should be no difference in the right to a jury trial in the different areas of the state. The committee anticipated that the power of the prosecutor under Rule 23.04 to treat many minor misdemeanors now punishable by incarceration as petty misdemeanors with the consent of the defendant should prevent any large backlog of jury cases from developing. Under Rule 23.05, subd. 1 a defendant is not entitled to a jury trial if the offense is to be treated (see Minn. Stat. Ch. 487) as a petty misdemeanor under Rule 23.04. Also, the broadened use of violations bureaus permitted under Rule 23.03 if implemented by the courts should result in fewer jury and court trial demands.

Rule 26.01, subd. 1(1)(b) providing that there shall be no jury trial at any stage in the prosecution of a misdemeanor not punishable by incarceration is largely consistent with present statutory law. See Minn. Stat. §§ 484.63 and 488.20 (appeals to district court); Minn. Stat. §§ 169.89, subd. 2 and 633.02 (statutory petty misdemeanors); Minn. Stat. § 488A.10, subd. 6 (Ramsey County Municipal Court after January 1, 1975). To the extent Minn. Stat. § 487.25, subd. 6 is inconsistent with Rule 26.01, subd. 1(1)(b) it is superseded.

Rule 26.01, subd. 1(2)(a) (Waiver of Trial by Jury on the Issue of Guilt) is based upon F.R.Crim.P. 23(a), ABA Standards, Trial by Jury, 1.2(b) (Approved Draft, 1968) and continues substantially present Minnesota law (Minn. Stat. § 631.01 (1971)) except that waiver of jury trial by the defendant requires the approval of the court. Rule 26.01, subd. 1(2)(b) establishes the procedure for waiver of a jury on the issue of an aggravated sentence. See Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004) and State v. Shattuck, 704 N.W.2d 131 (Minn. 2005) as to the constitutional limitations on imposing aggravated sentences based on findings of fact beyond the elements of the offense and the conviction history. Also, see Rules 1.04 (d), 7.03, and 11.04 and the comments to those rules. Whether a defendant has waived or demanded a jury trial on the issue of guilt, that defendant is still entitled to a jury trial on the issue of an aggravated sentence and a valid waiver under Rule 26.01, subd. 1(2)(b) is necessary before an aggravated sentence may be imposed based on findings not made by jury trial.

Rule 26.01, subd. 1(2)(c) (Waiver When Prejudicial Publicity). Under Rule 26.01, subd. 1(2)(c) the defendant shall be permitted to waive jury trial if required to assure the likelihood of a fair trial when there has been a dissemination of potentially prejudicial material. (See ABA Standards, Fair Trial and Free Press, 3.3 (Approved Draft, 1968).)

Rule 26.01, subd. 1(3) (Withdrawal of Waiver of Jury Trial) continues present Minnesota law (Minn. Stat. § 631.01 (1971)) and provides that waiver of jury trial may

be withdrawn before commencement of trial. Trial is commenced when jeopardy attaches. See comment to Rule 25.02.

Rule 26.01, subd. 1(4) (Waiver of Number of Jurors Required by Law) is drawn from F.R.Crim.P. 23(b) and ABA Standards, Trial by Jury, 1.3 (Approved Draft, 1968). (See also State v. Sackett, 39 Minn. 69, 38 N.W. 773 (1888).) The number of jurors required by law for felonies is 12 and for gross misdemeanors and misdemeanors is 6. (Minn. Stat. § 593.01 (1989).) (A jury of 6 would not contravene the United States Constitution. Williams v. Florida, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970).) The Minnesota Supreme Court held in State v. Hamm, 423 N.W.2d 379 (Minn.1988) that the provision in Minn. Stat. § 593.01 for 6-member juries in misdemeanor and gross misdemeanor cases violated the state constitution. After that decision Article 1, § 6 of the Minnesota Constitution was amended in 1988 to permit the legislature to provide for 6-member juries in non-felony criminal cases. The legislature re-enacted Minn. Stat. § 593.01, subd. 1, effective February 9, 1989.

Rule 26.01, subd. 1(5) (Number Required for Verdict) requires a unanimous verdict for felonies, gross misdemeanors, and misdemeanors and so continues existing law in those cases. (Minn. Stat. § 593.01 (1971).) (See also State v. Everett, 14 Minn. 439 (1869) (Gil 330).)

Rule 26.01, subd. 1(6) (Waiver of Unanimous Verdict) continues present Minnesota law. (State v. Zubrocki, 194 Minn. 346, 260 N.W. 507 (1935).) It is based on ABA Standards, Trial by Jury, 1.1(3) (Approved Draft, 1968) except that the defendant's consent is necessary for a less than unanimous verdict.

Rule 26.01, subd. 2 (Trial Without a Jury) requiring special findings in a case tried to the court is taken from F.R.Crim.P. 23(c), and in addition prescribes time limits for general findings and for special findings. Rule 14.01 prescribes the pleas referred to in the rule. The consequences of an omission of a finding on an essential fact comes from Minn.R.Civ.P. 49(a). The provision in Rule 26.01, subd. 3 (Trial on Stipulated Facts) for submitting the case to the court for decision on stipulated facts is in accord with ABA Standards for Criminal Justice 21-1.3(c) (1985). In addition to determining guilt, the trial on stipulated facts provisions of subdivision 3 could be used for determining whether aggravated facts exist to support an upward sentencing departure under Blakely v. Washington, 542 U.S. 296, 124 S. Ct. 2531 (2004). The rules do not permit conditional pleas of guilty whereby the defendant reserves the right to appeal the denial of a motion to suppress evidence or other pretrial order. State v. Lothenbach, 296 N.W.2d 854 (Minn.1980). Rule 26.01, subd. 4 (Stipulation to Prosecution's Case to Obtain Review of a Pretrial Ruling), implements the procedure authorized by State v. Lothenbach, 296 N.W.2d 854 (Minn. 1980). The rule supersedes the case as to the procedure for stipulating to the prosecution's case to obtain review of a pretrial ruling. The rule also distinguishes the Lothenbach-type procedure it implements from Rule 26.01, subd. 3 (Trial on Stipulated Facts). The latter rule should be used if there is no pretrial ruling dispositive of the case, and if the defendant wishes to have the full scope of appellate review, including a challenge to the sufficiency of the evidence. See State v. Busse, 644 N.W.2d 79, 89 (Minn. 2002). The phrase in the first sentence of Rule 26.01, subd. 4 – "or that the ruling otherwise makes a contested trial unnecessary" – recognizes that a pretrial ruling will not always be dispositive of the entire case, but that a successful appeal of the pretrial issue could nonetheless make a trial unnecessary, such as in a DWI case where the only issue is the validity of qualified prior impaired driving incidents as a

charge enhancement. See, e.g., State v. Sandmoen, 390 N.W.2d 419 (Minn. App. 1986). The parties could agree that if the defendant prevailed on appeal, the defendant would still have a conviction for an unenhanced DWI offense. Where a conviction for some offense is supportable regardless of the outcome of the appeal, but a contested trial would serve no purpose, the rule could be used.

Rule 26.02 (Selection of Jury). Rule 26.02, subd. 1 (Selection and Qualifications (of Jury)) continues present statutory law for the selection, drawing, and summoning of the trial jury (see Minn. Stat. §§ 593.02, 593.04, 593.13, 593.14, 593.17, 628.43, 628.44, 628.54 (1971) for the qualifications of jurors. See §§ 593.03, 593.05- 593.07, 593.09-593.13, 593.135, 593.14 for the selection, drawing, and summoning of jurors.) except that to satisfy constitutional requirements, it provides that the persons on the jury list from which the jury panel is drawn shall be selected at random from a fair cross-section of the residents of the county who are qualified to serve as jurors. (See a similar provision in Rule 18.01, subd. 2 governing the selection of the grand jury list.) (See also ABA Standards, Trial by Jury, 2.1(a) (Approved Draft, 1968).)

Rule 26.02, subd. 2(1) (List of Prospective Jurors) which provides that information about prospective jurors which is obtained by the jury clerk, including names and addresses, shall in the usual case be made available to the parties and counsel upon request is taken from ABA Standards, Trial by Jury, 15-2.2 (Approved Draft, 1978) and also provides that in addition to the jury list, the parties shall have access to such other information concerning the jurors as may be available at the clerk's office.

In the rare case, where there is a belief that dissemination of this information poses a threat to juror safety or impartiality, Rule 26.02, subd. 2(2) (Anonymous Jurors) provides for a hearing upon a party's motion that the jurors' names, addresses, telephone numbers and other identifying information not be distributed. At the hearing, the moving party will have an opportunity to present evidence and argument that there is reason to believe that the jury needs protection from external threats to its members' safety and impartiality. Upon a finding that there is strong reason to believe that this condition exists, the court may enter an order that information regarding identity, including names, telephone numbers, and addresses of prospective jurors be withheld from the public, parties and counsel. See State v. Bowles, 530 N.W.2d 521, 530-1 (Minn. 1995); State v. McKenzie, 532 N.W.2d 210, 219 (Minn. 1995). The restrictions ordered by the court may extend through trial and beyond as necessary to protect the safety and impartiality interests involved. To protect the identity of jurors and prospective jurors the court may order that they be identified by number or other method and may prohibit pictures or sketches in the courtroom. These procedures and protections are in accord with recommendation 22 of the Minnesota Supreme Court Jury Task Force Final Report of December 20, 2001. The trial court's decision will be reviewed under an abuse of discretion standard.

The trial court must recognize that not every trial where there is a threat to jurors' impartiality will require restriction on access to information about jurors. The decision to restrict access to information on jurors must be made in the light of reason, principle, and common sense.

In ensuring that restriction on the parties' access to information about the jurors does not have a prejudicial effect on the defendant, the trial court must take reasonable precautions to minimize the potential for prejudice. The court must allow voir dire on the

effect that restricting access to juror identification may have on the impartiality of the jurors. The court should also instruct the jurors that the jury selection procedures do not in any way suggest the defendant's guilt.

Rule 26.02, subd. 2(3) (Jury Questionnaire). The use of a written jury questionnaire has proved to be an extremely useful tool in obtaining information from prospective jurors in criminal cases. While its use has been primarily reserved for serious felony cases, experience has established that expanded use of this tool will increase the amount of important information provided by prospective jurors and also make for a more efficient jury selection process. This rule approves of the use of a written questionnaire on a wider scale and provides the procedure for its use. The written questionnaire provided in the Criminal Forms following these rules, includes generally non-sensitive questions relevant to jury selection in any criminal case. See Form 50 for the Jury Questionnaire. Additionally the cour on its own initiative or on request of counsel may submit to the prospective jurors as part of the questionnaire other written questions that may elicit sensitve information might be helpful based on the particular case to be tried.

Once the panel of prospective jurors for a particular case has been determined, the judge or court personnel will instruct the panel on the use of the questionnaire. The preamble at the beginning of the Jury Questionnaire (Form 50) provides the basic information to the prospective jurors including their right to ask the court to permit them to answer any sensitive question orally or privately. Upon completion of the questionnaire, the court shall make the questionnaire available to counsel for use in the jury selection process. The questionnaire may be sworn to either when signed or when the prospective juror appears in court at the time of the voir dire examination. Because of the information contained in the questionnaire, counsel will not need to expend court time on this information, but can move directly to follow-up questions on particular information already available in the questionnaire. However, the written questionnaire is intended only to supplement and not to substitute for the oral voir dire examination provided for by Rule 26.02, subd 4.

The use and retention of jury questionnaires have been subject to a variety of practices. This rule provides that the questionnaire is a part of the jury selection process and part of the record for appeal and reflects current law. As such, the questionnaires should be preserved as part of the court record of the case. See Rule 814 of the General Rules of Practice for the District Courts as to the length of time such records must be retained. Additionally, see Rule 26.02, subd. 2(2) as to restricting public access to the names, addresses, telephone numbers, and other identifying information concerning jurors and prospective jurors when the court determines that an anonymous jury is necessary.

It is recognized that the idea of the privacy of the questionnaire adds to the candor and honesty of the responses of the prospective jurors. However, in light of other applicable laws and the fact that the questionnaire is part of the record in the case, prospective jurors cannot be told that the questionnaire is confidential or will be destroyed at the conclusion of the case. Rather, the jurors can be told, as reflected in the preamble to the Jury Questionnaire (Form 50), that they can ask the court to permit them to answer sensitive questions orally and privately under Rule 26.02, subd. 4(4). This procedure should minimize the sensitive or embarrassing information in the written questionnaires and consequently the need for sealing or destroying them.

In addition to being part of the record in the case, jury selection is a part of the criminal trial which is presumed to be open to the public. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984) (Press-Enterprise I). The use of a jury questionnaire as part of jury selection is also a part of the open proceeding and therefore the public and the media have a right of access to that information in the usual case. See e.g., Lesher Communications, Inc. v. Superior Court of Contra Costa County, 224 Cal. App. 3d 774 (1990).

Rule 26.02, subd. 3 (Challenge to Panel) is based on ABA Standards, Trial by Jury, 2.3 (Approved Draft, 1968) and Minn. Stat. §§ 631.23, 631.24, 631.25 (1971) except that it substitutes an "objection" for the "exception" to the sufficiency of the challenge (Minn. Stat. § 631.24) and for the "denial" of the facts on which the challenge is based. (Minn. Stat. § 631.25 (1971).) If such an objection is made, the challenge is tried by the court.

Rule 26.02, subd. 4(1) (Purpose of Voir Dire Examination--By Whom Made). The provision of this rule governing the purpose for which voir dire examination shall be conducted and the provision for initiation of the examination by the judge is taken from ABA Standards, Trial by Jury, 2.4 (Approved Draft, 1968). The last sentence of the rule permitting the parties to interrogate the jurors before exercising challenges continues the similar provision of Minn. Stat. § 631.26 (1971) with the limitation that the inquiry shall be "reasonable". The court has the right and the duty to assure that the inquiries by the parties during the voir dire examination are "reasonable". The court may therefore restrict or prohibit questions that are repetitious, irrelevant, or otherwise improper. See State v. Bauer, 189 Minn. 280, 249 N.W. 40 (1933) and State v. Greer, 635 N.W.2d 82 (Minn. 2001) (holding no error in district court's restrictions on voir dire). However, the Minnesota Supreme Court's Task Force on Racial Bias in the Judicial System recommends in its Final Report, dated May 1993, that during voir dire lawyers should be given ample opportunity to inquire of jurors as to racial bias.

Rule 26.02, subd. 4(2)(a) (Sequestration of Jurors at Court's Discretion) gives the court the discretion to sequester jurors during the voir dire.

Rule 26.02, subd. 4(2)(b) (Prejudicial Publicity), following ABA Standards, Fair Trial and Free Press, 3.4(a) (Approved Draft, 1968), directs sequestration of the jurors during voir dire when there is a significant possibility that exposure to prejudicial publicity may result in disqualification of individual jurors. The standard (3.4(a)) recommends that the questioning should be conducted for the purpose of determining what the prospective juror has read and heard about the case and how that exposure has affected the prospective juror's attitude toward the trial, not to convince the prospective juror that it would be a dereliction of duty not to cast aside any preconceptions that might exist.

Rule 26.02, subd. 4(3) (Order of Drawing, Examination and Challenge of Jurors.) The purpose of this rule is to achieve uniformity in the order of drawing, examination, and challenge of jurors, but also to provide a limited number of alternatives that may be followed, in the discretion of the trial court. Hence, a uniform rule (26.02, subd. 4(3)(a)) is prescribed which is to be followed unless the court orders that one of the two alternatives, 26.02, subd. 4(3)(b) or (c), shall be adopted in a particular case. An exception is that in cases of first degree murder, Rule 26.02, subd. 4(3)(c) is to be

preferred unless otherwise ordered by the court. (See Rule 26.02, subd. 4(3)(c)8.)

Rule 26.02, subd. 4(3)(a) (Uniform Rule) is the uniform rule which is to be followed unless the court orders otherwise and substantially adopts the method used in civil cases, so that in a criminal case 20 members of the jury panel are first drawn for a 12-person jury. (See Minn. Stat. §§ 546.09, 546.10 (1971); Rule 27, PT. I, Code of Rules for the District Courts.) After each party has exercised challenges for cause, commencing with the defendant, they exercise their peremptory challenges alternately, commencing with the defendant. If all peremptory challenges are not exercised, the jury shall be selected from the remaining prospective jurors in the order in which they were called.

Rule 26.02, subd. 4(3)(b) (By Order of Court) is the first alternative to Rule 26.02, subd. 4(3)(a). With a 12-person jury to be selected, 12 members of the jury panel are first drawn, and as a juror is excused for cause or peremptorily, a replacement is drawn so that there are always 12 persons in the jury box. The order of examination and challenge prescribed by the rule, first by defendant and then by the state, retains existing law. (Minn. Stat. § 631.39 (1971).)

Rule 26.02, subd. 4(3)(c) (By Order of Court) is the second alternative to Rule 26.02, subd. 4(3)(a) and provides that the prospective jurors shall be drawn one at a time. Otherwise this rule is substantially the same as Rule 26.02, subd. 4(3)(b). In cases of first degree murder this alternative shall be preferred unless the court in its discretion orders otherwise.

Rule 26.02, subd. 4(4) (Exclusion of the Public from Voir Dire) provides the procedure and standards for excluding the public from voir dire or restricting access to related orders or transcripts when prospective jurors are questioned on sensitive or embarrassing matters. The Minnesota Supreme Court Jury Task Force in its Final Report of December 20, 2001 in recommendation 20 proposed that the Rules of Criminal Procedure be amended to safeguard the privacy interests of prospective jurors during voir dire when the interrogation focuses on highly sensitive or personal matters. Rule 26.02, subd. 4(4) does that, but subject to the dictates of Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984), which requires balancing a prospective juror's privacy interest against the defendant's right to a fair and public trial and the First Amendment right of the public to have access to court proceedings. Under that case only a compelling interest would justify closing voir dire to the public and any restrictions on access must be narrowly tailored to serve that interest. Closure of voir dire must be rare and should be ordered only when the interrogation touches on deeply personal matters that the prospective juror has legitimate reasons for keeping out of the public domain. Under the rule and in accord with Press-Enterprise, the request to close voir dire must be initiated by the prospective juror. However, the court must advise the prospective jurors of the right to make that request when it appears that sensitive questions may be asked during voir dire. Any determination by the court to close any part of the voir dire must be supported by findings either in writing or orally on the record. The court may withhold names, restrict access to orders or transcripts, and excise transcripts as may be necessary to safeguard the overriding privacy interests involved.

Rule 26.02, subd. 5(1) (Grounds of Challenge for Cause) with some changes of language, substantially adopts the grounds for challenge for cause under existing law (see Minn. Stat. §§ 631.28- 631.31 (1971)), but abolishes the classifications of the

grounds into general causes (§§ 631.28, 631.29), particular causes (§ 631.30), implied bias (§§ 631.30, 631.31), and actual bias (§§ 631.30, 631.32). For the definition of a felony conviction which would disqualify a person from service on the jury, see Minn. Stat. § 609.13 (1971). The term "related offense" in the rule is intended to be more comprehensive than the conduct or behavioral incident covered by Minn. Stat. § 609.035 (1971).

Rule 26.02, subd. 5(2) (How and When Challenge for Cause is Exercised) providing that a challenge for cause may be oral, stating the grounds upon which it is based, continues substantially the similar provisions of Minn. Stat. § 631.34 (1971). The requirement that a challenge for cause to an individual juror shall be made before the juror is sworn but for good cause may be made before all the jurors are sworn adopts substantially the provisions of Minn. Stat. § 631.26 (1971). As to when jeopardy attaches, see comment to Rule 25.02.

Rule 26.02, subd. 5(3) (By Whom Challenges for Cause are Tried) provides that if a party objects to a challenge for cause, it shall be tried by the court. The rule abolishes exceptions to and denials of the challenge (Minn. Stat. § 631.34 (1971)) by the triers of fact (Minn. Stat. § 631.34 (1971)) (Minn. Stat. § 631.35 (1971)).

Rule 26.02, subd. 6 (Peremptory Challenges) changes the number of peremptory challenges allowed by Minn. Stat. § 631.27 (1971) when the offense is punishable by life imprisonment from 20 for the defendant and 10 for the state to 15 and 9. The provision of § 631.27 giving the defendant 5 and the prosecution 3 peremptory challenges in the trial of other offenses is continued. The provision for additional peremptory challenges when there is more than one defendant comes from F.R.Crim.P. 24.

Rule 26.02, subd. 6a (Objections to Peremptory Challenges) is intended to adopt and implement the equal protection prohibition against purposeful racial and gender discrimination in the exercise of peremptory challenges established in Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712 (1986) and subsequent cases, including J.E.B. v. Alabama ex rel. T.B., 511 U.S. 127, 114 S.Ct. 1419 (1994) (extending the rule to gender-based discrimination). In applying this rule, the bench and bar should thoroughly familiarize themselves with the case law which has developed, particularly with respect to meanings of the terms "prima facie showing" "race-neutral explanation," "pretextual reasons," and "purposeful discrimination" used in the rule. See Batson, supra; Purkett v. Elem, 514 U.S., 115 S.Ct. 1769 (1995); Ford v. Georgia, 498 U.S. 411, 111 S.Ct. 850 (1991); Powers v. Ohio, 499 U.S. 400, 111 S.Ct. 1364 (1991); Hernandez v. New York, 500 U.S. 352, 111 S.Ct. 1859 (1991); Edmonson v. Leesville Concrete Co., 500 U.S. 614, 111 S.Ct. 2077 (1991) Georgia v. McCollum, 505 U.S. 42, 112 S.Ct. 2348 (1991); State v. Moore, 438 N.W.2d 101 (Minn. 1989); State v. Everett, 472 N.W.2d 864 (Minn. 1991); State v. Bowers, 482 N.W.2d 774 (Minn. 1992); State v. Scott, 493 N.W.2d 546 (Minn. 1992); and State v. McRae, 494 N.W.2d 252 (Minn. 1992). Although the rule expressly applies only to racial and gender discrimination, counsel and the court should be aware of the possibility that the Batson protections and procedures could be extended by caselaw to other protected classes, especially where that class is subject to heightened or strict scrutiny such as for religion. See State v. Davis. 504 N.W.2d 767 (Minn. 1993) cert. Denied Davis v. Minnesota, 511 U.S. 1115, 114 S.Ct. 2120 (1994). In the second step of the process under Rule 26.02, subd. 6a(3)(b), the responding party need only "articulate" a race or gender-neutral explanation for exercising the peremptory challenge. If that is done, the court proceeds to the third step in the process. During the

second step of the process the court is not to weigh or judge the explanation presented so long as it articulates a race or gender-neutral basis for the challenge. Purkett v. Elem, 514 U.S., 115 S.Ct. 1769 (1995).

Rule 26.02, subd. 7 (Order of Challenges) prescribes the order in which challenges shall be made: first, to the panel; second, to an individual juror for cause; and third, peremptorily to an individual juror. It supersedes the requirement of Minn. Stat. § 631.39 (1971) that challenges for cause be made for (1) general disqualification, (2) implied bias, and (3) actual bias, in that order.

Rule 26.02, subd. 8 (Alternate Jurors) is based on F.R.Crim.P. 24(c) and ABA Standards, Trial by Jury, 2.7 (Approved Draft, 1968) and displaces Minn. Stat. § 546.095 (1971). It places no limitations on the number of alternate jurors and permits no additional peremptory challenges and differs in those respects from the federal rule and § 546.095.

Rule 26.03, subd. 1(1) (Presence Required) is taken from F.R.Crim.P. 43. See also Rules 14.02 and 27.03, subd. 2. The interpreter requirement is based upon Rule 5.01 and Minn. Stat. §§ 611.31- 611.24 (1992).

Rule 26.03, subd. 1(2) (Continued Presence Not Required) is based upon Proposed F.R.Crim.P. 43(b) (1971) 52 F.R.D. 472, Allen v. Illinois, 397 U.S. 337, 90 S.Ct. 1057 (1970) and Minn. Stat. § 631.015 (1971). If a defendant fails to be present at the trial, the court may proceed with the trial unless it appears that the defendant's absence was involuntary. The defendant may move for a new trial on the ground any absence was involuntary.

Rule 26.03, subd. 1(3) (Presence Not Required), permitting the defendant's absence from proceedings in the case of misdemeanors, is drawn from proposed F.R.Crim.P. 43(c) (1971) 52 F.R.D. 472 (see also Rules 14.02 and 27.03, subd. 2.) In addition, in the case of felonies and gross misdemeanors, it permits the court to excuse defendant's presence from any proceeding except arraignment, plea, trial, and imposition of sentence.

Rule 26.03, subd. 1(3) 4 is based upon the recommendation of the Minnesota Supreme Court Criminal Courts Study Commission. The purpose of the rule is to facilitate the hearings in non-dispositive, uncontested, and ministerial hearings whenever counsel, court, and defendant agree.

Rule 26.03, subd. 2 (Custody and Restraint of Defendants and Witnesses) is taken from ABA Standards, Trial by Jury, 4.1(a), (b), (c) (Approved Draft, 1968). Refusal of a defendant to put on or wear non-distinctive attire of a prisoner that has been made available shall constitute a waiver of this provision and shall not be grounds for delaying the trial.

Rule 26.03, subd. 3 (Use of Courtroom) comes from ABA Standards, Fair Trial and Free Press 3.5(a) (Approved Draft, 1968).

Rule 26.03, subd. 4 (Preliminary Instructions) is adapted from ABA Standards, Trial by Jury 4.6(a) (Approved Draft, 1968) and Minn.R.Civ.P. 39.03.

Rule 26.03, subd. 5(1) (Sequestration of Jury in Discretion of Court) permits sequestration of the jury in the discretion of the court from the time the jury is sworn until deliberation begins.

Rule 26.03, subd. 5(2) (Sequestration on Motion) directing sequestration on motion of either party when prejudicial publicity may come to the attention of the jurors, comes from ABA Standards, Fair Trial and Free Press 3.5(b) (Approved Draft, 1968).

Rule 26.03, subd. 6 (Exclusion of Public From Hearing or Arguments Outside the Presence of the Jury) is based on Minneapolis Star and Tribune Company v. Kammeyer, 341 N.W.2d 550 (Minn.1983) which established similar procedures for excluding the public from pretrial hearings. See the comment to Rule 25.01 concerning those procedures. When the record of proceeding from which the public is excluded is made available, the court may order that names be deleted or substitutions therefor made for the protection of innocent persons. This rule for exclusion of the public is not intended to interfere with the power of the court, in connection with any hearing held outside the presence of the jury, to caution those present that dissemination of specified information by any means of public communication, prior to the rendering of the verdict, may jeopardize right to a fair trial by an impartial jury. (See ABA Standards, Fair Trial and Free Press 3.5(d) (Approved Draft, 1968).) An agreement by the news media not to publicize matters heard until after completion of the trial could afford the basis for a determination by the court that there is no substantial likelihood of interfering with an overriding interest, including the right to a fair trial, by permitting the news media or the public to be present. Re provision for appellate review, see comment to Rule 25.01.

Rule 26.03, subd. 7 (Cautioning Parties, Witnesses, Jurors and Judicial Employees; Insulating Witnesses) comes from ABA Standards, Fair Trial and Free Press, 3.5(c) (Approved Draft, 1968).

Rule 26.03, subd. 8 (Admonitions to Jurors) adopts the substance of ABA Standards for Criminal Justice 8-3.6(a) (1985). In any case that appears likely to be of significant public interest, an admonition in substantially the following form, suggested by ABA Standards for Criminal Justice 8-3.6(e) (1985), may be given before the end of the first day if the jury is not sequestered:

"During the time you serve on this jury, there may appear in the newspapers or on radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your verdict meet certain standards; for example, witnesses may testify about events personally seen or heard but not about matters told to them by others. Also, witnesses must be sworn to tell the truth and must be subject to cross-examination. News reports about the case are not subject to these standards, and if you read, listen to, or watch these reports, you may be exposed to information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction."

If the process of selecting a jury is a lengthy one, such an admonition may also be given to each juror as selected. At the end of each subsequent day of the trial, and at other recess periods if the court deems necessary, an admonition in substantially the following form suggested by Standard 3.5(e) may be given:

"For the reasons stated earlier in the trial, I must remind you not to read, listen to, or watch any news reports concerning this case while you are serving on this jury."

Rule 26.03, subd. 9 (Questioning Jurors About Exposure to Potentially Prejudicial Material in the Course of a Trial) adopts ABA Standards, Fair Trial and Free Press, 3.5(f) (Approved Draft, 1968).

Rule 26.03, subd. 10 (View by Jury) adapted from N.Y.C.P.L. 270.50, replaces Minn. Stat. § 546.12 (1971).

Rule 26.03, subd. 11 (Order of Jury Trial) substantially continues the order of trial under existing practice. (See Minn. Stat. § 546.11 (1971).) The order of closing argument, under sections "h", "i", "j", "k", and "l" of this rule reflects a change. The prosecution argues first, then the defense. The prosecution is then automatically entitled to rebuttal argument. However, this argument must be true rebuttal and is limited to directly responding to matters raised in the defendant's closing argument. Allowance of the rebuttal argument to the prosecution should result in a more efficient and less confusing presentation to the jury. The prosecution will only need to address those defenses actually raised by the defendant rather than guessing, perhaps wrongly, about those defenses. In the event that the prosecution engages in improper rebuttal, paragraph "k" of the rule provides upon motion, for a limited right of rebuttal to the defendant to address misstatements of law or fact and any inflammatory or prejudicial statements. The court has the inherent power and duty to assure that any rebuttal or surrebuttal arguments stay within the limits of the rule and do not simply repeat matters from the earlier arguments or address matters not raised in earlier arguments. It is the responsibility of the court to ensure that final argument to the jury is kept within proper bounds. ABA Standards for Criminal Justice, The Prosecution Function 3-5.8 and The Defense Function 4-7.8 (1985). If the argument is sufficiently improper, the trial judge should intervene even without objection from opposing counsel. See State v. Salitros, 499 N.W.2d 815 (Minn. 1993); State v. White, 295 Minn. 203 N.W.2d 852 (1973).

Rule 26.03, subd. 12 (Note Taking) is adapted from Minn. Stat. § 631.10 (1971) and ABA Standards, Trial by Jury 4.2 (Approved Draft, 1968).

Rule 26.03, subd. 13 (Substitution of Judge) supersedes Minn. Stat. § 542.16 (1988) concerning notice to remove a judge in criminal proceedings. Parts (1) and (2) of the rule are taken from F.R.Crim.P. 25(a)(b) and ABA Standards, Trial by Jury 4.3 (Approved Draft, 1968) and take the place of Minn. Stat. § 484.29 (1971). Part (3) of the rule is based on Unif.R.Crim.P. 741(c) (1987). Unlike Minn.R.Civ.P. 63.02, the criminal rule defers to the Code of Judicial Conduct as to the grounds for disqualification and provides expressly that the judge sought to be removed may not hear and determine the issue. See Rule 3C of the Code of Judicial Conduct as to the grounds for disqualification. Part (4) of the rule is based on Minn.R.Civ.P. 63.03 except that the time limit specified for the notice differs from that provided by the civil rule and Minn. Stat. § 542.16(1988). The rule follows existing law and permits either the defendant or the prosecuting attorney to serve and file a notice to remove a judge as a matter of right without cause. State v. Kraska, 294 Minn. 540, 201 N.W.2d 742 (1972). Only one such removal as a matter of right is permitted to a party. Any other removals must be for cause. A request to remove a judge for cause may be made either before or after exercising the right to remove a judge without showing cause. A judge who has previously presided at the trial, the

Omnibus Hearing, or other evidentiary hearing in the case, of which a party had notice, may not later be removed from the case by that party without a showing of cause. However, a party is not foreclosed from later serving and filing a notice to remove a judge who simply presided at an appearance under Rule 5 or Rule 8 in the case. Part (5) of the rule concerning recusal is based on Unif.R.Crim.P. 741(b) (1987). Under that rule a judge should disqualify himself or herself "whenever the judge has any doubt as to his or her ability to preside impartially in a criminal case or whenever the judge believes his or her impartiality can reasonably be questioned." ABA Standards for Criminal Justice 6-1.7 (1985). Part (6) of the rule is based in part on Minn.R.Civ.P. 63.03 and 63.04 and Minn. Stat. § 542.16 (1988).

Rule 26.03, subd. 14(1) (Exceptions Abolished) is taken from Minn.R.Civ.P. 46 and supersedes Minn. Stat. § 547.03 (1971).

Rule 26.03, subd. 14(2) (Bills of Exception and Settled Cases Abolished) abolishes the bill of exceptions and settled case provided by Minn. Stat.§§ 547.02-06, 632.05 (1971) and adopts Minn.R.Civ.P. 59.02 and Minn.R.Civ.App.P. 110.01 providing for the record on a hearing upon a motion for new trial and on appeal. See also F.R.Crim.P. 26.

Rule 26.03, subd. 15 (Evidence) leaves to the Minnesota Rules of Evidence the issues of the admissibility of evidence and the competency of witnesses except as otherwise provided in these rules. As to the use of a deposition at a criminal trial, Rule 21.06 controls rather than the Minnesota Rules of Evidence if there is any conflict between them. See Rule 802 and the comments to Rule 804 in the Minnesota Rules of Evidence. The prohibition in Rule 26.03, subd. 15 against jurors submitting questions to witnesses is taken from State v. Costello, 646 N.W.2d 204 (Minn. 2002).

Rule 26.03, subd. 15 provides that any party offering a videotape or audiotape exhibit may also provide to the court a transcript of the tape. This rule does not govern whether any such transcript is admissible as evidence. That issue is governed by Article 10 of the Minnesota Rules of Evidence. However, upon an appeal of the proceedings, the transcript of the exhibit will be part of the record if the other party stipulates to the accuracy of the tape transcript as provided in Rule 28.02, subd. 9.

The provisions in Rule 26.03, subd. 16 (Interpreters) concerning the appointment of and compensation for interpreters comes from F.R.Crim.P. 28(b). The provision in the rule allowing qualified interpreters for any juror with a sensory disability to be present in the jury room during deliberations and voting was added to the rule to conform with Minn. Stat. § 593.32 and Rule 809 of the Jury Management Rules in the General Rules of Practice for District Courts which prohibit exclusion from jury service for certain reasons including sensory disability. Further, this provision allows the court to make reasonable accommodation for such jurors under the Americans with Disabilities Act. 42 U.S.C. § 12101 et seq. Caselaw holding that the presence of an alternate juror during deliberations is considered to be presumptively prejudicial, State v. Crandall, 452 N.W.2d 708 (Minn. App. 1990) would not apply to such qualified interpreters present during deliberations. As to an interpreter's duties of confidentiality and to refrain from public comment see respectively Canons 5 and 6 of the Code of Professional Responsibility for Interpreters in the Minnesota State Court System.

Rule 26.03, subd. 17 (Motion for Judgment of Acquittal or Insufficiency of

Evidence to Support an Aggravated Sentence), abolishing motions for directed verdict, and providing for motions for judgment of acquittal is taken from F.R.Crim.P. 29(a)(b)(c) and ABA Standards, Trial by Jury, 4.5(a)(b)(c) (Approved Draft, 1968). Such a motion by the defendant, if not granted, should not be deemed to withdraw the case from the jury or to bar the defendant from offering evidence. (See F.R.Crim.P. 29(a), ABA Standards, Trial by Jury, 4.5(a) (Approved Draft, 1968).) A defendant is also entitled to a jury determination of any facts beyond the elements of the offense or conviction history that might be used to aggravate the sentence. Blakely v. Washington, 542 U.S. 296, 124 S.Ct. 2531 (2004); State v. Shattuck, 704 N.W.2d 131 (Minn. 2005). If such a trial is held, the rule also provides that the defendant may challenge the sufficiency of the evidence presented.

Rule 26.03, subd. 18(1) (Requests for Instructions) follows Minn.R.Civ.P. 51. See also F.R.Crim.P. 30 and ABA Standards, Trial by Jury 4.6(b) (Approved Draft, 1968).

Rule 26.03, subd. 18(2) (Proposed Instructions) substantially adopts similar provisions in Minn. Stat. § 546.14 (1971).

Rule 26.03, subd. 18(3) (Objections to Instructions) is adapted from F.R.Crim.P. 30 and ABA Standards, Trial by Jury 4.6(c)(e) (Approved Draft, 1968). The last sentence relating to errors in fundamental law comes from Minn.R.Civ.P. 51.

Rule 26.03, subd. 18(4) (Giving of Instructions) comes from Minn.R.Civ.P. 51 except that the provisions permitting the giving of instructions before closing arguments and the jury to take written instructions to the jury room are new.

Rule 26.03, subd. 18(5) (Contents of Instructions) provides that the court shall instruct the jury on the law and may summarize the claims of the parties, but does not permit comment on the evidence or on the credibility of the witnesses. Compare Minn. Stat. § 631.08 (1971) which provides that the judge may "present the facts of the case."

Rule 26.03, subd. 18(6) (Verdict Forms) requires that where aggravated sentence issues are presented to a jury, the court shall submit the issues to the jury by special interrogatory. For a sample form for that purpose see CRIMJIG 8.01 of the Minnesota Criminal Jury Instruction Guide. When that is done, Rule 26.03, subd. 19(5) permits any of the parties to request that the jury be polled as to their answers.

Rule 26.03, subd. 19 (Jury Deliberations and Verdict.)

Rule 26.03, subd. 19(1) (Materials to Jury Room) adopts the substance of Minn. Stat. § 631.10. [See also ABA Standards, Trial by Jury, 5.1(a) (Approved Draft, 1968).] It also permits the jury to take to the jury room a copy of the instructions, in the discretion of the court. For the notes of the jury see Rule 26.03, subd. 12.

Rule 26.03, subd. 19(2) (Jury Requests to Review Evidence) comes from ABA Standards, Trial by Jury, 5.2(a)(b) (Approved Draft, 1968) and takes the place of a similar provision of Minn. Stat. § 631.11 (1971).

Rule 26.03, subd. 19(3) (Additional Instructions After Jury Retires) is based on ABA Standards, Trial by Jury, 5.3(a)(b)(c) and takes the place of a similar provision of

Minn. Stat. § 631.11 (1971).

Rule 26.03, subd. 19(4) (Deadlocked Jury.)

The kind of instructions that may be given to a deadlocked jury is left to judicial decision or to formulation of a pattern instruction. In State v. Martin, 297 Minn. 359, 211 N.W.2d 765 (1973), the Minnesota Supreme Court disapproved an Allen instruction (Allen v. United States, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896)) and adopted ABA Standards, Trial by Jury, 5.4 (Approved Draft, 1968).

Rule 26.03, subd. 19(5) (Polling the Jury) is drawn from ABA Standards, Trial by Jury, 5.5 (Approved Draft, 1968) and Minn. Stat. § 631.16 (1971).

Rule 26.03, subd. 19(6) (Impeachment of Verdict) adopts the procedure outlined in Swartz v. Minneapolis Suburban Bus Co., 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960).

Rule 26.03, subd. 19(7) (Partial Verdict) is taken from Unif.R.Crim.P. 535(e) (1987) and from State v. Olkon, 299 N.W.2d 89 (Minn.1980) which authorized the court to accept a partial verdict. Under the rule a partial verdict of either guilty or not guilty may be accepted by the court.

Rule 26.04 (Post-Verdict Motions.)

Rule 26.04, subd. 1(1) (Grounds of New Trial) substantially adopts the grounds for a new trial set forth in Minn. Stat. § 547.01 (1971) and adds the ground that a new trial may be granted in the interests of justice. (See F.R.Crim.P. 33.) ABA Standards, Fair Trial and Free Press, 3.6 (Approved Draft, 1968) recommends that a verdict of guilty should be set aside and a new trial granted whenever, on the basis of competent evidence, the court finds a substantial likelihood that the vote of one or more of the jurors was influenced by exposure to an extra-judicial communication of any matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. Under existing Minnesota law, a motion for a new trial should not be granted on that ground if the defendant, having knowledge during the trial that one or more jurors has been exposed to an extra-judicial communication, fails promptly to move for a mistrial. (See State v. O'Donnell, 280 Minn. 213, 158 N.W.2d 699 (1968) outlining the steps to be taken by defense counsel in the event of prejudicial publicity during trial.)

Rule 26.04, subd. 1(2) (Basis of Motion for New Trial) is taken from Minn.R.Civ.P. 59.02 and supersedes Minn. Stat. §§ 547.02, 547.023 (1971).

Rule 26.04, subd. 1(3) (Time for Motion) is based upon Minn.R.Civ.P. 59.03 and F.R.Crim.P. 35 and supersedes Minn. Stat. §§ 547.02, 547.023 (1971). The post-conviction remedy, Minn. Stat. §§ 590.01- 590.06 (1971) provides a means for relief on the ground of newly discovered evidence after the time for making a motion for new trial.

Rule 26.04, subd. 1(4) (Time for Serving Affidavits) is taken from Minn.R.Civ.P. 59.04.

Rule 26.04, subd. 2 (Motion to Vacate Judgment) is based on F.R.Crim.P. 34

except that it is treated as a motion to vacate judgment instead of a motion in arrest of judgment and permits the court to vacate a judgment of acquittal and to dismiss the case on the grounds stated or to dismiss the case if a judgment has not been entered.

Rule 26.04, subd. 3 (Joinder of Motions) provides for joinder of motions for new trial (Rule 26.04, subd. 1) and motions to vacate judgment (Rule 26.04, subd. 2).

Rule 26.04, subd. 4 (New Trial on Court's Initiative) permits the court to grant a new trial on its initiative with the consent of the defendant.

Rule 27. Sentence and Judgment

Rule 27.01 Conditions of Release

When a defendant has been convicted and is awaiting sentence, the court may continue or alter the conditions for defendant's release, or may order confinement of the defendant, taking into account the conditions of release and the factors determining the conditions of release as provided by Rule 6.02, subd. 1 and subd. 2 and whether there is reason to believe that the defendant will flee or pose a danger to any person or to the community. The burden of establishing that the defendant will not flee or will not be a danger to any other person or to the community rests with the defendant.

Comment—Rule 27

See comment following Rule 27.05.

Rule 27.02 Presentence Investigation in Misdemeanor Cases

In misdemeanor cases, the report of the presentence investigation may be oral if so directed by the court. If the presentence report is given orally, the defendant or defense counsel shall be permitted to hear the report.

Comment—Rule 27

See comment following Rule 27.05.

Rule 27.03 Sentencing Proceedings

Subd. 1. Hearings. Hearings upon the presentence report and upon the sentence to be imposed upon the defendant shall be held as provided by law. Before the sentencing proceeding, in a misdemeanor or gross misdemeanor case, each party shall notify the opposing party and the court of any part of a written presentence report which the party intends to controvert by the production of evidence. Both the prosecutor and the defendant or defense counsel shall have an opportunity to controvert any part of an oral presentence report and for such purpose the court may continue the sentencing.

The procedure for such hearings in felony cases shall be as follows:

(A) At the time of, or within three days after a plea, finding or verdict of guilty of a felony, the court may order a presentence investigation and shall order that a sentencing

worksheet be completed. As part of any presentence investigation and report, the court may order a mental or physical examination of the defendant. The court shall also then:

(1) Set a date for the return of the report of the presentence investigation.

(2) Set a date, time and place for the sentencing.

(3) Order the defendant to return at such date, time and place.

(4) If the facts ascertained at the time of a plea or through trial cause the judge to consider a mitigated departure from the sentencing guidelines appropriate, the court shall advise counsel of such consideration.

(B) The presentence investigation report, if ordered, shall include the information required by Minn. Stat. § 609.115, subd. 1, a completed sentencing guidelines worksheet and any supplemental worksheets and such other information as the court may direct. The report shall be submitted to the court in triplicate.

(C) The court shall cause a copy of the sentencing worksheet and the nonconfidential portion of the presentence investigation report, if any, to be forwarded to the prosecutor and to the defendant or defense counsel subject to the limitations of Minn. Stat. § 609.115, subd. 4. If the presentence investigation report contains a confidential information section that portion need not be forwarded to counsel or to defendant but counsel should be advised that such information is available for inspection at some designated place.

If departure from the sentencing guidelines appears appropriate, and the court has not previously notified the parties or counsel for the parties that the court is considering departure, the court shall forward notification of such consideration at the time the sentencing worksheet and any presentence investigation report is forwarded.

(D) Upon receipt of the sentencing worksheet and any presentence investigation report, any party desiring a sentencing hearing shall, not later than eight days before the date for the sentencing, file with the court and serve on opposing counsel a motion for such hearing, except that when the sentencing worksheet and any presentence investigation report is received within eight days prior to the sentencing date, the motion for a sentencing hearing shall be made within a reasonable time after receipt of the worksheet and any report. If necessary, the court shall continue the sentencing.

The motion for a sentencing hearing shall specifically set forth the reasons for the motion, including a designation of any portion of the presentence investigation report or sentencing guidelines worksheet challenged, and the grounds for the challenge supported by affidavits or other documentation.

(E) Opposing counsel shall file and serve any reply not later than three days before the sentencing date.

(F) At the sentencing hearing, issues raised in the sentencing hearing motion shall be heard. In addition, any remaining factual or legal issues relating to the sentence shall be succinctly stated on the record by counsel. The court shall also permit the record to be supplemented by such testimony as it deems relevant and material to the issues.

At the conclusion of the sentencing hearing, the court may state into the record findings of fact, conclusions of law and appropriate order on the issues submitted by the parties. Otherwise, the court shall issue written findings of fact, conclusions of law and appropriate order within twenty days of the conclusion of the sentencing hearing.

If it is determined upon hearing that the sentencing worksheet or supplement submitted as a part of any presentence investigation report contains an error or errors, the court shall cause a corrected worksheet to be prepared, filed and submitted to the sentencing guidelines commission.

(G) The court may impose sentence immediately following the conclusion of the sentencing hearing.

Subd. 2. Defendant's Presence at Hearing and Sentencing. Defendant must be personally present at the sentencing hearing and at the time sentence is pronounced except when excused pursuant to Rule 26.03, subd. 1(3). If the defendant is handicapped in communication, a qualified interpreter for the defendant must also be present. Sentence may be pronounced against a corporation in the absence of counsel if counsel fails to appear on the date of sentence after reasonable notice thereof.

Subd. 3. Statements at Time of Sentencing. Before pronouncing sentence, the court shall give the prosecutor, the victim, and defense counsel an opportunity to make a statement with respect to any matter relevant to the question of sentence including a recommendation as to sentence. The court shall also address the defendant personally and ask if the defendant wishes to make a statement in the defendant's own behalf and to present any information before sentence including, in the discretion of the court, oral statements from other persons on behalf or the defendant. The court shall not accept any communication relative to sentencing that is not on the record without disclosing the contents to the defense and to the prosecution.

Subd. 4. Imposition of Sentence. When sentence is imposed the court:

(A) Shall state the precise terms of the sentence.

(B) Shall assure that the record accurately reflects all time spent in custody in connection with the offense or behavioral incident for which sentence is imposed. Such time shall be automatically deducted from the sentence and the term of imprisonment including time spent in custody as a condition of probation from a prior stay of imposition or execution of sentence.

(C) For felony cases if the sentence imposed departs from the sentencing guidelines applicable to the case, the court shall state, on the record, findings of fact as to the reasons for departure. In addition, the reasons for departure shall either be: (a) stated in a sentencing order; or (b) recorded in the departure report as provided by the sentencing guidelines commission and attached to the sentencing form provided for in subdivision 6. The sentencing order or sentencing form with attached departure report shall be filed with the commission within 15 days after the date of sentencing.

(D) Prior to imposition of a sentence in a felony case which deviates from the sentencing guidelines, the court shall allow either party to request a sentencing hearing if no sentencing hearing was held and the court did not give prior notice that the sentence imposed might depart from the sentencing guidelines.

(E) If the court elects to stay imposition or execution of sentence:

(1) The court shall state the precise term during which imposition or execution will be stayed.

(2) In felony cases, the court shall advise the defendant that noncustodial probation time may not be credited against the sentence in the event that probation is ultimately revoked and sentence executed.

(3) If noncriminal conduct could result in revocation, the trial court should advise the defendant so that the defendant can be reasonably able to tell what lawful acts are prohibited.

(4) A written copy of the conditions of probation should be given to the defendant at the time of sentencing or soon thereafter.

(5) The defendant should be told that in the event of a disagreement with the probation agent as to the terms and conditions of probation, the defendant can return to the court for clarification if necessary.

Subd. 5. Notice of Right to Appeal. After imposition of sentence or granting of probation the court shall inform the defendant of the right to appeal the judgment of conviction or sentence or both and the right of a person who is unable to pay the cost of appeal to apply for leave to appeal at state expense by contacting the state public defender.

Subd. 6. Record.

(A) A verbatim record of the sentencing proceedings shall be made. The defendant, prosecution, or any person may, at their expense, order a transcript of the verbatim record made in accordance with this rule. When requested, the transcript must be completed within 30 days of the date the transcript was requested in writing and satisfactory financial arrangements were made for the transcription.

(B) Information from the sentencing proceeding for counts for which the offense level prior to sentencing was a felony or gross misdemeanor shall also be recorded in a sentencing form or order that, at a minimum, contains:

(1) the defendant's name;

(2) case number;

(3) for each count:

a. if the defendant pled guilty to or was found guilty of the offense:
    i. the offense date;
    ii. a citation to the offense statute;
    iii. the information specified in subdivision 4 (precise terms of sentence including the amount of any fine, time spent in custody, whether the sentence is a departure and if so, the reasons therefor, and terms and conditions of probation);
    iv. the level of sentence; and
    v. restitution, if appropriate, and whether it shall be joint and several with other persons; or
b. if the defendant did not plead guilty to or was not found guilty of the offense, that the defendant was acquitted or the count was dismissed;

(4) other financial obligations such as surcharges, law library fees, court costs, and treatment evaluation costs; and

(5) the signature of the sentencing judge.

The sentencing order shall be provided in place of the transcript required in Minnesota Statutes sections 243.49 and 631.41.

Subd. 7. Judgment. The clerk's record of a judgment of conviction shall contain the plea, the verdict of findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The sentence or stay of imposition of sentence is an adjudication of guilt.

Subd. 8. Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record or errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Subd. 9. Correction or Reduction of Sentence. The court at any time may correct a sentence not authorized by law. The court may at any time modify a sentence during either a stay of imposition or stay of execution of sentence except that the court may not increase the period of confinement.

Comment—Rule 27

See comment following Rule 27.05.

Rule 27.04 Probation Revocation

Subd. 1. Commencement of Proceedings.

(1) Issuance of Revocation Warrant or Summons. Proceedings for the revocation of probation shall be commenced by the issuance of a warrant or a summons by the court based upon a written report showing probable cause to believe that the probationer has violated any conditions of probation. The written report shall include a description of the surrounding facts and circumstances upon which the request for revocation is based. The court shall issue a summons instead of a warrant whenever it is satisfied that a warrant is unnecessary to secure the appearance of the probationer, unless it reasonably appears that the arrest of the defendant is necessary to prevent harm to the defendant or another. If the probationer fails to appear in response to a summons, a warrant may be issued.

(2) Contents of Warrant and Summons. Both the warrant and summons shall contain the name of the probationer, a description of the probationary sentence sought to be revoked, the signature of the issuing judge or judicial officer of the district court, and shall be accompanied by the written report upon which it was based. The amount of any bail or other conditions of release may be set by the issuing judge or judicial officer and endorsed on the warrant. The warrant shall direct that the probationer be brought promptly before the court that issued the warrant if it is in session. If that court is not in session the warrant shall direct that the probationer be brought before a judge or judicial officer of that court, without unnecessary delay, and in any event not later than 36 hours after the arrest exclusive of the day of arrest, or as soon thereafter as such judge or judicial officer is available. The summons shall summon the probationer to appear at a stated time and place to respond to the revocation charges.

(3) Execution or Service of Warrant or Summons; Certification. Execution, service, and certification of the warrant or summons shall be as provided in Rule 3.03.

Subd. 2. First Appearance.

(1) Advice to Probationer. A probationer who initially appears before the court pursuant to a warrant or summons concerning an alleged probation violation, shall be advised of the nature of the violation charged. Prior to doing this, the judge, judicial officer, or other duly authorized personnel shall determine whether the probationer is handicapped in communication and, if so, appoint a qualified interpreter to assist the probationer throughout the probation violation proceedings. The probationer shall also be given a copy of the written report upon which the warrant or summons was based if the probationer has not previously received such report. The judge, judicial officer, or other duly authorized personnel shall further advise the probationer substantially as follows:

a. That the probationer is entitled to counsel at all stages of the proceedings, and if financially unable to afford counsel, one will be appointed for the probationer upon request;

b. That unless waived, a revocation hearing will be held to determine

whether there is clear and convincing evidence that the probationer has violated any conditions of probation and that probation should therefore be revoked;

c. That before the revocation hearing all evidence to be used against the probationer shall be disclosed to the probationer and the probationer shall be provided access to all official records pertinent to the proceedings;

d. That at the hearing both the prosecution and the probationer shall have the right to offer evidence, present arguments, subpoena witnesses, and call and cross-examine witnesses, provided, however, that the probationer may be denied confrontation by the court when good cause is shown that a substantial risk of serious harm to others would exist if it were allowed. Additionally, the probationer shall have the right at the revocation hearing to present mitigating circumstances or other reasons why the violation, if proved, should not result in revocation;

e. That the probationer has the right of appeal from the determination of the court following the revocation hearing.

(2) Appointment of Counsel. The appointment of counsel for a probationer financially unable to afford counsel shall be governed by the standards and procedures set forth in Rule 5.02.

(3) Conditions of Release. The probationer may be released pending appearance at the revocation hearing. In deciding upon the conditions of release and whether to release the probationer, the court shall take into account the conditions of release and the factors determining the conditions of release as provided by Rule 6.02, subd. 1 and subd. 2 and whether there is a reason to believe that the probationer will flee or pose a danger to any person in the community. The burden of establishing that the probationer will not flee or will not be a danger to any other person or the community rests with the probationer.

(4) Time of Revocation Hearing. The court shall set a date for the revocation hearing to be held within a reasonable time before the court which granted probation. If the probationer is in custody as a result of the revocation proceedings, the revocation hearing shall be held within seven days. If the probationer has allegedly violated a condition of probation by commission of a crime, the court may postpone the revocation hearing pending disposition of the criminal case whether or not the probationer is in custody.

(5) Record. A verbatim record shall be made of the proceedings at the probationer's initial appearance before the court under this rule.

Subd. 3. Revocation Hearing.

(1) Hearing Procedures. The hearing shall be held in accordance with the provisions of subd. 2(1)(a), (b), (c), and (d) of this rule.

(2) Finding of No Violation of Conditions of Probation. If the court finds that a violation of the conditions of probation has not been established by clear and convincing evidence, the revocation proceedings shall be dismissed, and the probationer's probation continued under the conditions theretofore ordered by the court.

(3) Finding of Violation of Conditions of Probation. If the court finds upon clear and convincing evidence that any conditions of probation have been violated, or if the probationer admits the violation, the court may proceed as follows:

a. Imposition of Sentence Stayed. If imposition of sentence was initially stayed, and probationer placed on probation, the court may again stay imposition of sentence or impose sentence and stay execution thereof, and in either event place the probationer on probation pursuant to Minn. Stat. § 609.135, or impose sentence and order the execution thereof.

b. Execution of Sentence. If execution of sentence initially imposed was stayed and probationer placed on probation, the court may continue the stay and place the probationer on probation in accordance with the provisions of Minn. Stat. § 609.135, or order execution of the sentence previously imposed.

(4) Record of Findings. A verbatim record shall be made of the proceedings at the revocation hearing and in any contested hearing the court shall make written findings of fact on all disputed issues including a summary of the evidence relied upon and a statement of the court's reasons for its determination.

(5) The probationer or the prosecution may appeal from the court's decision. The appeal shall proceed according to the procedure provided for appeal from a sentence by Rule 28.05, except that if appellant files a notice of appeal and order for transcript within 90 days of the revocation hearing, appellant's brief shall be identified as a probation revocation appeal brief and shall be due within 30 days of the delivery of the transcript. Preparation of the transcript shall be governed by the Minnesota Rules of Civil Appellate Procedure. All other procedures are governed by Rule 28.05.

Comment—Rule 27

See comment following Rule 27.05.

Rule 27.05 Pretrial Diversion

Subd. 1. Agreements Permitted.

(1) Generally. After due consideration of the victim's views and subject to the court's approval, the prosecuting attorney and the defendant may agree that the prosecution will be suspended for a specified period after which it will be dismissed under subdivision 7 of this rule on condition that the defendant not commit a felony, gross misdemeanor, misdemeanor or petty misdemeanor offense during the period. The agreement shall be in writing and signed by the parties. It shall state that the defendant waives the right to a speedy trial. It may include stipulations concerning the existence of specified facts or the admissibility into evidence of specified testimony, evidence, or depositions if the suspension of prosecution is terminated and there is a trial on the charge.

(2) Additional Conditions. Subject to the court's approval after due consideration of the victim's views and upon a showing of substantial likelihood that a conviction could be obtained and that the benefits to society from rehabilitation outweigh any harm to society from suspending criminal prosecution, the agreement may specify one or more of the following additional conditions to be observed by the defendant during the period:

a. that the defendant not engage in specified activities, conduct, and associations bearing a relationship to the conduct upon which the charge against the defendant is based;

b. that the defendant participate in a supervised rehabilitation program, which may include treatment, counseling, training, and education;

c. that the defendant make restitution in a specified manner for harm or loss caused by the crime charged; and

d. that the defendant perform specified community service.

(3) Limitations on Agreements. The agreement may not specify a period longer or any condition other than could be imposed upon probation after conviction of the

crime charged.

Subd. 2. Filing of Agreement; Release. Promptly after the agreement is made and approved by the court, the prosecuting attorney shall file the agreement together with a statement that pursuant to the agreement the prosecution is suspended for a period specified in the statement. Upon the filing, the defendant shall be released from any custody under Rule 6.

Subd. 3. Modification of Agreement. Subject to subdivisions 1 and 2 of this rule and with the court's approval, the parties by mutual consent may modify the terms of the agreement at any time before its termination.

Subd. 4. Termination of Agreement; Resumption of Prosecution.

(1) Upon Defendant's Notice. The agreement is terminated and the prosecution may resume as if there had been no agreement if the defendant files a notice that the agreement is terminated.

(2) Upon Order of Court. The court may order the agreement terminated and the prosecution resumed if, upon motion of the prosecuting attorney stating facts supporting the motion and upon hearing, the court finds that:

a. the defendant or defense counsel misrepresented material facts affecting the agreement, if the motion is made within six months after the date of the agreement; or

b. the defendant has committed a material violation of the agreement, if the motion is made not later than one month after the expiration of the period of suspension specified in the agreement.

Subd. 5. Emergency Order. The court by warrant may direct any officer authorized by law to bring the defendant forthwith before the court for the hearing of the motion if the court finds from affidavit or testimony that:

(1) there is probable cause to believe the defendant committed a material violation of the agreement; and

(2) there is a substantial likelihood that the defendant otherwise will not attend the hearing.

In any case the court may issue a summons instead of a warrant to secure the appearance of the defendant at the hearing.

Subd. 6. Release Status upon Resumption of Prosecution. If prosecution resumes under subdivision 4 of this rule, the defendant shall return to the release status in effect before the prosecution was suspended unless the court imposes additional or different conditions of release under Rule 6.

Subd. 7. Termination of Agreement; Dismissal. If no motion by the prosecuting attorney to terminate the agreement is pending, the agreement is terminated and the complaint, indictment, or tab charge shall be dismissed by order of the court one month after expiration of the period of suspension specified by the agreement. If such a motion is then pending, the agreement is terminated and the complaint, indictment, or tab charge shall be dismissed by order of the court upon entry of a final order denying the motion. Following a dismissal under this subdivision the defendant may not be further prosecuted

for the offense involved.

Subd. 8. Termination and Dismissal upon Showing of Rehabilitation. The court may order the agreement terminated, dismiss the prosecution, and bar further prosecution of the offense involved if, upon motion of a party stating facts supporting the motion and opportunity to be heard, the court finds that the defendant has committed no later offenses as specified in the agreement and appears to be rehabilitated.

Subd. 9. Modification or Termination and Dismissal Upon Defendant's Motion. If, upon motion of the defendant and hearing, the court finds that the prosecuting attorney obtained the defendant's consent to the agreement as a result of a material misrepresentation by a person covered by the prosecuting attorney's obligation under Rule 9.01, subd. 1(7), the court may:

(1) order appropriate modification of the terms resulting from the misrepresentation; or

(2) if the court determines that the interests of justice require, order the agreement terminated, dismiss the prosecution, and bar further prosecution for the offense involved.

Comment—Rule 27

Rule 27.01 (Conditions of Release) is based on F.R.Crim.P. 32, 46(c) and 28 U.S.C. § 3148. Pending sentence the conditions for defendant's release or whether the defendant should be confined are to be determined under Rules 6.02, subd. 1 and subd. 2, governing pre-trial release, but the defendant has the burden of establishing the defendant will not flee or pose a danger to any other person or to the community.

Minn. Const. Art. I, § 7, provides that all persons shall before conviction be bailable by sufficient sureties. The defendant is not entitled to bail as a matter of right after conviction.

Rule 27.02 (Presentence Investigation in Misdemeanor Cases.) In misdemeanor cases the presentence investigation report may be oral rather than written and this will often be the case. Where the report is oral, the defendant or defense counsel must be allowed to hear the report when given. If a presentence report is prepared, the officer conducting the investigation is required by Minn. Stat. § 609.115, subd. 1 and Minn. Stat. § 611A.037 to advise the victim of the crime concerning the victim's rights under those statutes and under Minn. Stat. § 611A.038. Those rights include the rights to request restitution and to submit an impact statement to the court at sentencing.

Rule 27.03 (Sentencing Proceedings.)

Rule 27.03, subd. 1 (Hearings) adopts for misdemeanors and gross misdemeanors the provisions for summary hearings upon the presentence report and sentence contained in Minn. Stat. §§ 609.115, subd. 4, and 631.20 (1982). The provision for notice of any part of the presentence report that a party intends to controvert comes from ABA Standards, Sentencing Alternatives and Procedures, 18-5.5 (Approved Draft, 1979). Of course, where the report is oral there would be no opportunity to give such notice and possibly no chance to controvert objectionable information contained in the report. Both parties are entitled to an opportunity to controvert even parts of an oral

report and to do this the court may continue the sentencing so evidence can be obtained.

The sentencing hearings "as provided by law" under Rule 27.03, subd. 1 would include restitution proceedings under Minn. Stat. §§ 611A.04 and 611A.045 (1988). The authorization and procedure to obtain restitution as set forth in the Minnesota rules and statutes substantially conforms to the "Guidelines Governing Restitution to Victims of Criminal Conduct" approved by the American Bar Association on August 9-10, 1988.

Sentencing in felony cases for offenses committed on or after May 1, 1980, is governed by Minn. Stat., Ch. 244 and the Minnesota Sentencing Guidelines promulgated pursuant to those statutes. The more complex procedures required by these rules for felony cases are necessary for a proper sentencing decision under the sentencing guidelines. Because of the adoption of the Minnesota Sentencing Guidelines an ad hoc volunteer committee chaired by Chief Justice Douglas Amdahl drafted proposed rules for sentencing under the guidelines. These rules were approved by the District Court Judges Association and the Ramsey County District Court Judges. The proposals of the ad hoc committee have been substantially incorporated into Rules 27.03, subds. 1 through 5 and these comments.

The Sentencing Guidelines Commission recommends that where the felony involved a sexual offense, that the trial court order a physical or mental examination of the offender as a supplement to the presentence investigation permitted by Minn. Stat. § 609.115. Minnesota Sentencing Guidelines and Commentary, Training Material, III. E. (Hereinafter referred to as Training Manual.) Rule 27.03, subd. 1(A) permits the court to order such examinations. This rule is not intended to preclude a post-sentence investigation whenever required by statute (Minn. Stat. § 609.115, subd. 2 (sentence of life imprisonment)) or whenever the court considers one necessary. The presentence investigation may include the information obtained on the pretrial release investigation under Rule 6.02, subd. 3. If a defendant is convicted of a domestic abuse offense as defined by Minn. Stat. § 609.2244, subd. 1, a presentence domestic abuse investigation must be conducted. A report must then be submitted to the court which meets the requirements set forth in Minn. Stat. § 609.2244, subd. 2.

The Advisory Committee strongly commends the practice, now in effect in some counties, of preparing the Sentencing Guidelines Worksheet prior to the Omnibus Hearing. This may be done in connection with a pre-release investigation under Rule 6.02, subd. 3 and may later be included with any presentence investigation report required under Rule 27.03, subd. 1.

The date for the return of the presentence investigation report should be set sufficiently in advance of sentencing to allow counsel sufficient time to make any motion pursuant to Rule 27.03, subd. 1(D). The officer conducting the presentence investigation is required by Minn. Stat. § 609.115 and Minn. Stat. § 611A.037 to advise any victim of the crime concerning the victim's rights under those statutes and under Minn. Stat.§ 611A.038. Those rights include the rights to request restitution and to submit an impact statement to the court at sentencing.

The date of the sentencing should be determined after consultation with counsel to determine if unusual problems are anticipated in obtaining the information necessary to complete the report of the presentence investigation (e.g., securing necessary documentation of out-of-state convictions needed to compute the criminal history index

score).

As to the confidential information section of a presentence investigation report mentioned in Rule 27.03, subd. 1(C), see County of Sherburne v. Schoen, 306 Minn. 171, 236 N.W.2d 592 (1975).

The ad hoc committee suggested that judges rely on the facts of the conviction offense or offenses considered in the light of factors such as are set forth in the guidelines as a ground for departure and not ask for recommendations for departure from the presentence investigator.

Rule 27.03, subd. 1(D) essentially continues existing practice and imposes time requirements. Unlike Minn. Stat. § 244.10, subd. 1, this rule does require that the motion for a sentencing hearing include grounds.

Rule 27.03, subd. 1(F) is in accord with Minn. Stat. § 244.10, subd. 1, which requires that written findings of fact, conclusions of law and appropriate order on the issues raised at the sentencing hearing be issued at the conclusion of the hearing or within twenty days thereafter.

In Rule 27.03, subd. 1(G) the term "sentencing hearing" refers to the hearing required by Minn. Stat. § 244.10, subd. 1 on issues of sentencing. In the usual case, actual sentencing should immediately follow.

Rule 27.03, subd. 2 (Defendant's Presence at Hearing and Sentencing) is adopted from F.R.Crim.P. 43. See also N.Y.C.P.L. 380.40. The interpreter requirement is based upon Rule 5 and Minn. Stat. §§ 611.31- 611.34 (1992).

Rule 27.03, subd. 3 (Statements at the Time of Sentencing) is based on ABA Standards, Sentencing Alternatives and Procedures, 18-6.3 and 18-6.4 (Approved Draft, 1979). See also N.Y.C.P.L. 380.50. The right of the victim of the crime to make a statement at sentencing is in accord with Minn. Stat. § 611A.038.

Rule 27.03, subd. 4 (Imposition of Sentence) parts (A) and (B) are based on ABA Standards, Sentencing Alternatives and Procedures, 18-6.6iii, iv (Approved Draft, 1979). Existing law relating to probation is continued (Minn. Stat. §§ 609.135, 609.14).

Minn. Stat. § 611A.06 requires the Commissioner of Corrections or other custodial authority to notify the victim of the crime when an offender is to be released from imprisonment. Minn. Stat. § 611A.0385 further requires that the court or its designee shall at the time of the sentencing make reasonable good faith efforts to inform any identifiable victims of their right to such notice under Minn. Stat. § 611A.06.

Minn. Stat. § 244.10, subd. 2 requires written findings of fact as to the reasons for departure from the sentencing guidelines. The court's statement into the record under Rule 27.03, subd. 4(C), should satisfy this requirement, but the rule further requires that the reasons for departure must be stated in a sentencing order or in a departure report attached to the sentencing order. Whichever document is used, it must be filed with the sentencing guidelines commission within 15 days of the date of the sentencing.

Rule 27.03, subd. 4(D) is designed to eliminate any possible due process notice problems where a defendant does not request a sentencing hearing because of an expectation of receiving a sentence in conformance with the sentencing guidelines. It is also anticipated that fewer sentencing hearings will be requested by the prosecution and defense so long as there is an opportunity to request such a hearing after notice that the court might depart from the guidelines.

Rule 27.03, subd. 4(E) is designed to avoid any due process notice problems if probation is revoked and sentence executed. A defendant has a right to refuse probation when the conditions of the probation are more onerous than a prison sentence, State v. Randolph, 316 N.W.2d 508 (Minn.1982).

As to part (E)(3) of Rule 27.03, subd. 4, the sentencing guidelines indicate that revocation of a stayed sentence should not be based on merely technical violations, and a court should instead use expanded and more onerous conditions of probation for such technical violations. (Training Manual III. B.) The Minnesota Supreme Court has stated that a trial court should refer to the following ABA Standard in determining whether to revoke probation:

Grounds for and alternatives to probation revocation.

(a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original offense and the intervening conduct of the offender that:

(i) confinement is necessary to protect the public from further criminal activity by the offender; or
(ii) the offender is in need of correctional treatment which can most effectively be provided if the offender is confined; or
(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked. ABA Standards for Criminal Justice, Probation section 5.1(a) (Approved Draft, 1970) cited in State v. Austin, 295 N.W.2d 246 (Minn.1980), and State v. Modtland, 695 N.W.2d 602 (Minn. 2005).

Rule 27.03, subd. 5 (Notice of Right to Appeal) is based on F.R.Crim.P. 32. Failure to notify the defendant of the right to appeal does not extend the time for appeal. Minn. Stat. § 244.11 authorizes either the defendant or the state to appeal from a sentence whether imposed or stayed. See Rule 28.05 for the procedure to be followed on such an appeal.

Rule 27.03, subd. 6 (Record), requiring a verbatim record of the sentencing proceedings, is in accord with ABA Standards, Sentencing Alternatives and Procedures, 5.7 (Approved Draft, 1968). To the extent there is any conflict, the provisions of this rule supersede the provisions of Minnesota Statutes, section 243.49 relative to the transcription of trial court proceedings. If a transcript of the verbatim record is requested, it then must be completed within 30 days after the request is made in writing and satisfactory arrangements are made for payment of the transcript. See the Order of the Supreme Court, C1-84-2137, dated October 31, 2003, promulgating amendments to the Minnesota Rules of Criminal Procedure, which abolished the mandatory automatic transcription of guilty plea and sentencing hearings in felony and gross misdemeanor

cases. However, pursuant to Rule 27.03, subd. 6, the court is required to record in a sentencing order the information as specified by the rule. See forms 49A and 49B in the Criminal Forms following these rules for examples of the type of order required.

Rule 27.03, subd. 7 (Judgment), stating what the record of the judgment shall contain, is adapted from F.R.Crim.P. 32(b). The sentence or stay of imposition of sentence constitutes an adjudication of guilt if the court does not sooner make such an adjudication.

Rule 27.03, subd. 8 (Clerical Mistakes) for correction of clerical mistakes is taken from F.R.Crim.P. 36.

Rule 27.03, subd. 9 (Correction or Reduction of Sentence), adopted from F.R.Crim.P. 35, permits the court to correct an unauthorized sentence at any time. This would include a failure to follow proper procedures in connection with the imposition of sentence. The rule also permits the court at any time to modify a sentence during either a stay of imposition or stay of execution of sentence except to increase the period of confinement. The powers of the court under this rule are not limited by the duration or expiration of a term of court. Other remedies available in connection with the sentence are provided for the post-conviction remedy (Minn. Stat. Ch. 590 (1971)).

Rule 27.04 (Probation Revocation) sets forth the procedure to be followed to assure that a defendant is accorded all constitutional rights to due process as set forth in Gagnon v. Scarpelli, 411 U.S. 778 (1973) and Morrissey v. Brewer, 408 U.S. 471 (1972) before probation is revoked. The rule is based primarily on ABA Standards, Sentencing Alternatives and Procedures, 18-7.5 (Approved Draft, 1979) except that no preliminary hearing to determine probable cause is required. Such a hearing, however, is not constitutionally required if the defendant is not in custody or if the final revocation hearing is held within the time that the preliminary hearing would otherwise be required. Pearson v. State, 308 Minn. 287, 241 N.W.2d 490 (1976). The requirement of Rule 27.04, subd. 2(4) that the final revocation hearing be held within seven days if the defendant is in custody makes a preliminary hearing constitutionally unnecessary. It is, however, necessary under Rule 27.04, subd. 1(2) that the defendant be brought before the court after arrest within the same time limits as set forth under Rule 3.02, subd. 2 for arrests upon warrant.

At that time the court may order the defendant released under Rule 27.04, subd. 2(3) pending the final revocation hearing. At that initial appearance the defendant shall also be given the written report showing probable cause if not already provided, have counsel appointed if necessary, be advised as to the rights under the rule, and have a time set for the final revocation hearing.

The provisions in Rule 27.04, subd. 1(1) as to the contents of the written report and in Rule 27.04, subd. 2(1) as to the defendant's various procedural rights are taken from ABA Standards, Sentencing Alternatives and Procedures, 18-7.5(d) and (e) (Approved Draft, 1979). The interpreter requirement is based upon Rule 5 and Minn. Stat. §§ 611.31- 611.34 (1992). The provisions in Rule 27.04, subd. 2(3) concerning release of the defendant are similar to those set forth in Rule 27.01 concerning release of a defendant pending sentencing. The standard of proof set forth in Rule 27.04, subd. 3(2) and (3) is taken from ABA Standards, Sentencing Alternatives and Procedures, 18-7.5(e).

Rule 27.05 (Pretrial Diversion) is based on Unif.R.Crim.P. 442 (1987) and ABA Standards for Criminal Justice 10-6.1 through 10-6.3 (1985) except that court approval is required for all pretrial diversion when charges are pending during the period of diversion. This rule does not preclude the prosecuting attorney and defendant from agreeing to diversion of a case without court approval if charges are not pending before the court. The requirement in subd. 1(1) that the prosecuting attorney give "due consideration of the victim's views" is in accord with the requirement in Minn. Stat. § 611A.031 that the prosecuting attorney "make every reasonable effort to notify and seek input from the victim" before employing pretrial diversion for certain specified offenses. With the approval of the court, the conditions specified in Rule 27.05, subd. 1(2), including restitution, may be included in the pretrial diversion agreement. See Minn. Stat. §§ 611A.04 and 611A.045 as to requiring restitution as part of a sentence. Under Rule 27.05, subd. 1(3), no condition may be included in the pretrial diversion agreement that could not be imposed upon probation after conviction of the crime charged. See Minn. Stat. § 609.135 as to the permissible conditions of probation. See Minn. Stat. § 611A.031 regarding the prosecutor's duties under the Victim's Rights Act, for certain designated offenses, to make every reasonable effort to notify and seek input prior to placing a person into a pretrial diversion program.

Rule 28. Appeals to Court of Appeals

Rule 28.01 Scope of Rule

Subd. 1. Appeals from District Court. Rule 28 governs the procedure for appeals in misdemeanor, gross misdemeanor, and felony cases from the district courts to the Court of Appeals except for cases in which the defendant has been convicted of murder in the first degree.

Subd. 2. Applicability of Rules of Civil Appellate Procedure. Except as otherwise provided in these rules, the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern appellate procedures in such cases.

Subd. 3. Suspension of Rules. In the interest of expediting decision, or for other good cause shown, the Court of Appeals may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its initiative and may order proceedings in accordance with its direction, but the Court of Appeals may not alter the time for filing notice of appeal except as provided by these rules.

Comment—Rule 28

See comment following Rule 28.05.

Rule 28.02 Appeal by Defendant

Subd. 1. Review by Appeal. Except as provided by law for the issuance of the extraordinary writs and for the Post-Conviction Remedy, a defendant may obtain review of orders and rulings of the district courts by the Court of Appeals only by appeal as provided by these rules. Writs of error are abolished.

Subd. 2. Appeal as of Right.

(1) Final Judgment and Postconviction Appeal. A defendant may appeal as of right from any adverse final judgment or from an order denying in whole or in part a petition for postconviction relief under Minn. Stat. Ch. 590. A judgment shall be considered final within the meaning of these rules when there is a judgment of conviction upon the verdict of a jury or the finding of the court, and sentence is imposed or the imposition of sentence is stayed.

(2) Orders. A defendant may not appeal until final judgment adverse to the defendant has been entered by the trial court except that a defendant may appeal from an order refusing or imposing conditions of release or in felony and gross misdemeanor cases from:

1. an order granting a new trial when the defendant claims that the trial court should have entered a final judgment in the defendant's favor;

2. an order, not on the defendant's motion, finding the defendant incompetent to stand trial,; or

3. an order denying a motion to dismiss a complaint following a mistrial where the issue is whether retrial would violate double jeopardy.

(3) Sentences. A defendant may appeal as of right from any sentence imposed or stayed in a felony case. All other sentences may be reviewed only pursuant to Rule 28.02, subd. 3.

Subd. 3. Discretionary Appeal. The Court of Appeals in the interests of justice and upon petition of the defendant may allow an appeal from an order not otherwise appealable, except an order made during trial, in the manner provided by the Minnesota Rules of Civil Appellate Procedure, provided that the petition shall be served and filed within thirty (30) days after entry of the order appealed.

Subd. 4. Procedure for Appeals Other than Sentencing Appeals.

(1) Service and Filing. An appeal shall be taken by filing a notice of appeal with the clerk of the appellate courts together with proof of service on the prosecuting attorney, the attorney general for the State of Minnesota, and the clerk of the trial court in which the judgment or order appealed from is entered. A bond shall not be required of a defendant for exercising the right to appeal. Unless otherwise ordered by the appellate court, defendant need not file a certified copy of the judgment or order appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure. Failure of the defendant to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) Contents of Notice of Appeal. The notice of appeal shall specify the party or parties taking the appeal; shall give the names, addresses, and telephone numbers of all counsel and indicate whom they represent; shall designate the judgment or order from which appeal is taken; and shall state that the appeal is to the Court of Appeals.

(3) Time for Taking an Appeal. An appeal by a defendant shall be taken within 90 days after final judgment or entry of the order appealed from in felony and gross misdemeanor cases. Upon the felony or gross misdemeanor appeal, other charges which were joined for prosecution with the felony or gross misdemeanor may be included. An appeal by a defendant shall be taken within 10 days after final judgment or entry of the order appealed from in misdemeanor cases. An appeal from an order denying a petition

for postconviction relief shall be taken within 60 days after entry of the order. A notice of appeal filed after the announcement of a decision or order, but before sentencing or entry of judgment or order shall be treated as filed after such entry or sentencing and on the day thereof. If a timely motion to vacate the judgment, for judgment of acquittal, or for a new trial has been made, the time for an appeal from a final judgment does not begin to run until the entry of an order denying the motion, and the order denying the motion may be reviewed upon the appeal from the judgment.

A judgment or order is entered within the meaning of these appellate rules when it is entered upon the record of the clerk of the trial court.

For good cause the trial court or a judge of the Court of Appeals may, before or after the time for appeal has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed herein for appeal.

(4) Stay of Appeal for Postconviction Proceedings. If, after filing a notice of appeal, a defendant determines that a petition for postconviction relief is appropriate, the defendant may file a motion to stay the appeal for postconviction proceedings.

Subd. 5. Proceedings in Forma Pauperis. Proceedings on appeal or postconviction in forma pauperis shall be as follows:

(1) An indigent defendant wanting to appeal or to obtain postconviction relief shall make application therefor to the office of the State Public Defender.

(2) The office of the State Public Defender shall promptly send to such applicant a financial inquiry form, preliminary questionnaire form and such other forms as deemed appropriate.

(3) The applicant shall, if the applicant wants to pursue the application, completely fill out these forms, sign each of these forms, and have his or her signature notarized on each of these forms if indicated.

(4) The applicant shall then return these completed documents to the office of the State Public Defender for further processing.

(5) The State Public Defender's office shall determine if the applicant is financially and otherwise eligible for representation. If the applicant is so eligible then the State Public Defender shall provide representation regarding a judicial review or an evaluation of the merits of a judicial review of the case in a felony case and may so represent the applicant in misdemeanor or gross misdemeanor cases. Upon the administrative determination by the State Public Defender's office that the office will represent an applicant for such a review or evaluation, the State Public Defender is automatically appointed for that purpose without order of the court. The State Public Defender's office shall notify the applicant of its decision on representation and advise the applicant of any problem relative to the applicant's qualifications to obtain the services of the State Public Defender's office. Any applicant who contests a decision of the State Public Defender's office that the applicant is ineligible for representation may apply to the Minnesota Supreme Court for relief.

(6) All requests for transcripts necessary for judicial review or efforts to have cases reviewed in which the defendant is not represented by an attorney shall be referred by the court receiving the same to the office of the State Public Defender for processing as in paragraphs (2) through (5) above.

(7) Requests for transcripts made by indigent defendants who are represented by

private counsel shall be submitted to the State Public Defender and processed in the following manner:

a. The State Public Defender shall determine financial eligibility of the applicant as in paragraphs (2) through (5) above.

b. If the defendant is financially eligible, he or she may request the State Public Defender to order all parts of the trial transcript necessary for effective appellate review. The State Public Defender shall order and pay for all parts of the transcript that are necessary for effective appellate review.

c. If a dispute arises concerning what parts of the trial transcript are necessary for effective appellate review, a motion for resolution of the matter may be made by the defendant or by the State Public Defender in the appropriate court.

d. The State Public Defender shall provide the transcript to the attorney for the indigent defendant for the purpose of perfecting the direct appeal. The attorney shall sign a receipt for the transcript agreeing to return it to the State Public Defender when the appeal process is complete.

(8) All court administrators shall furnish the office of the State Public Defender copies of any documents in their possession without charge.

(9) All fees, including appeal fees, hearing fees or filing fees, ordinarily charged by the clerk of the appellate courts or court administrators shall automatically be waived in cases in which the State Public Defender's office, or other public defender's office, represents the defendant in question. Such fees shall also be waived by the court upon a sufficient showing by any other attorney that the defendant is unable to pay the fees required.

(10) Unless otherwise specifically provided by Supreme Court order, the State Public Defender's office shall be appointed to represent all eligible indigent defendants in all appeal or postconviction cases as provided above, regardless of which county in the state is the county in which the defendant was accused.

(11) In appeal cases and postconviction cases, the cost of transcripts and other necessary expenses shall be borne by the State of Minnesota from funds available to the State Public Defender's office, regardless of which county in the state is the county in which the defendant was accused, if approved by the State Public Defender.

(12) When a defendant is represented on appeal by the State Public Defender's office, the provision of Rule 110.02, subd. 2, of the Minnesota Rules of Civil Appellate Procedure concerning the certificate as to transcript shall not apply. Rather, in such cases, the State Public Defender upon ordering the transcript shall mail a copy of the written request for transcript to the court administrator of the trial court, the clerk of the appellate courts, and the prosecuting attorney. The reporter shall promptly acknowledge receipt of said order and acceptance of it, in writing, with copies to the court administrator of the trial court, the clerk of the appellate courts, the State Public Defender, and the prosecuting attorney. In so doing, the reporter shall state the estimated number of pages of the transcript and the estimated completion date not to exceed 60 days, except for guilty plea and sentencing proceeding transcripts, which must be completed within 30 days. Upon delivery of the transcript, the reporter shall file with the clerk of the appellate courts a certificate evidencing the date of delivery.

(13) A defendant may proceed pro se on appeal only after the State Public Defender has first had the opportunity to file a brief on behalf of the defendant. The State Public Defender at the time of filing and serving the brief shall also provide a copy of the brief to the defendant. If the defendant then chooses to proceed pro se on appeal or to file a supplementary brief, the defendant shall so notify the State Public Defender.

(14) Upon receiving notice pursuant to paragraph (13) that the defendant has chosen to proceed pro se on appeal or to file a supplementary brief, the State Public

Defender's office shall confer with the defendant about the reasons for choosing to do so and advise the defendant concerning the consequences and ramifications of that choice.

(15) In order to proceed pro se on appeal following consultation, the defendant shall sign and return to the State Public Defender's office a detailed waiver of counsel as provided by that office for the particular case.

(16) If the State Public Defender's office believes, after consultation, that the defendant may not be competent to waive counsel it shall assist the defendant in seeking an order from the district court determining the competency or incompetency of the defendant.

(17) The brief filed by the State Public Defender on behalf of the defendant shall be considered by the court. A defendant, whether or not choosing to proceed pro se, may also file with the court a supplemental brief. The supplemental brief shall be filed within 30 days after the initial brief is filed by the State Public Defender.

(18) If a defendant requests a copy of the transcript, the State Public Defender's office shall confer with the defendant concerning the need for the transcript. If the defendant still requests a copy of the transcript it shall be provided to the defendant temporarily.

(19) Upon receiving the transcript, the defendant must sign a receipt for it including an agreement not to make the transcript available to other persons and to return the transcript to the State Public Defender's office upon expiration of the time to file any supplementary brief.

(20) The transcript remains the property of the State Public Defender's office and must be returned to that office upon expiration of the time to file any supplemental brief. Upon return of the transcript to the State Public Defender's office, that office shall provide the defendant with a copy of a signed receipt for it. The original of the receipt shall be filed promptly with the clerk of the appellate courts and until it is filed the defendant's supplemental brief will not be accepted for filing.

Subd. 6. Stay. When an appeal is taken by the defendant, the execution of judgment or sentence shall not be stayed unless a stay is granted by the trial court judge or a judge of the appellate court.

Subd. 7. Release of Defendant.

(1) Conditions of Release. Upon appeal, if the court grants a stay under subd. 6 of this rule, the conditions for defendant's release and the factors determining the conditions of release shall be governed by Rule 6.02, subd. 1 and subd. 2, except as hereinafter provided by this rule. The court shall also take into consideration that the defendant may be compelled to serve the sentence imposed before the appellate court has an opportunity to decide the case.

(2) Burden of Proof. Release pending appeal from a judgment of conviction upon which the defendant was sentenced to incarceration shall not be granted unless the defendant establishes to the satisfaction of the court that there is no substantial risk the defendant will not appear to answer the judgment following the conclusion of the appellate proceedings, that the defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice, and that the appeal is not frivolous or taken for delay.

(3) Application for Release Pending Appeal. Application for release pending appeal shall be made in the first instance to the trial court. If the trial court refuses release pending appeal, or imposes conditions of release, the court shall state on the record the reasons for the action taken. Thereafter, if an appeal is pending, a motion for

release, or for modification of the conditions of release, pending review, may be made to the appellate court or a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the prosecuting attorney. The appellate court or a judge thereof may order the release of the defendant pending disposition of the motion.

(4) Credit for Time Spent in Custody. All time the defendant is in custody pending an appeal shall be automatically deducted from the sentence imposed by the court.

(5) If a defendant convicted of a crime against person is released pending appeal pursuant to this rule, the prosecution shall make reasonable good faith efforts to advise the victim as soon as possible of the defendant's release.

Subd. 8. Record on Appeal. The record on appeal shall consist of the papers filed in the trial court, the offered exhibits, and the transcript of the proceedings, if any. Bills of exception and settled cases are abolished.

In lieu of the record as defined by this rule, the parties may within 60 days after filing of the notice of appeal prepare, sign, and file with the clerk of trial court a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court, stating only the claims and facts essential to a decision. If the statement is accurate, it, together with such additions as the trial court may consider necessary to present the issues raised by the appeal, shall be approved by the trial court and shall be the record on appeal. Any recitation of the essential facts of the case, conclusions of law, the memorandum relating thereto of the trial court shall be included with the record. An appellant who intends to proceed on appeal with a statement of the case under this rule rather than by obtaining a transcript, or without a statement of the case or transcript, shall serve notice of intent to do so on respondent and the clerk of the trial court and file the notice with the clerk of the appellate courts all within the time provided for ordering a transcript.

Subd. 9. Transcript of Proceedings and Transmission of the Transcript and Record. The Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the transcript of the proceedings and the transmission of the transcript and record to the Court of Appeals, except that the transcript shall be ordered within 30 days after filing of the notice of appeal and may be extended by the appellate court for good cause shown. Any videotape or audiotape exhibits admitted at trial or hearing shall, if not previously transcribed, be transcribed at the request of either the appellant or the respondent unless the parties have already stipulated to the accuracy of a transcript of such exhibit previously made a part of the record in the trial court. The transcript of any such exhibit then shall be included as part of the record. It shall not be necessary for the court reporter to certify the corrections of any such videotape or audiotape transcript. If the entire transcript is not to be included, the appellant, within the 30 days, shall file with the clerk of the appellate courts and serve on the clerk of the trial court and respondent a description of the parts of the transcript which the appellant intends to include in the record and a statement of the issues the appellant intends to present on appeal. If the respondent deems a transcript of other parts of the proceedings to be necessary, the respondent shall order, within 10 days of service of the description or notification of no transcript, those other parts from the reporter deemed necessary, or serve and file a motion in the trial court for an order requiring the appellant to do so.

Subd. 10. Briefs. The appellant shall serve and file the appellant's brief and

appendix within 60 days after delivery of the transcript by the reporter or after the filing of the trial court's approval of the statement pursuant to subd. 8 of this rule or Rule 110.03 of the Minnesota Rules of Civil Appellate Procedure. In all other cases, if the transcript is obtained prior to appeal or if the record on appeal does not include a transcript, then the appellant shall serve and file the appellant's brief and appendix with the clerk of the appellate courts within 60 days after the filing of the notice of appeal. The respondent shall serve and file the respondent's brief and appendix, if any, within 45 days after service of the brief of appellant. The appellant may serve and file a reply brief within 15 days after service of the respondent's brief. In all other respects the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the form and filing of briefs and appendices except that the appellant's brief shall contain a statement of the procedural history.

Subd. 11. Scope of Review. On appeal from a judgment, the court may review any pretrial or trial order or ruling, whether or not a motion for new trial has been made, and may review the denial of a motion for new trial or to vacate judgment or for judgment of acquittal, whether ruled upon before or after judgment. The court may review any other matter as the interests of justice may require.

Subd. 12. Action on Appeal. On appeal from a judgment, if the court affirms the judgment, it shall direct the sentence as pronounced by the trial court or as modified by the appellate court pursuant to Rule 28.05, subd. 2, be executed. If it reverses the judgment, it shall either direct a new trial, or that the defendant be discharged or that the conviction be reduced to a lesser included offense or to an offense of lesser degree, as the case may require. If the conviction is reduced, the case shall be returned to the court which imposed the sentence for resentencing.

Subd. 13. Oral Argument.

(1) Allowance of Oral Argument. There shall be oral argument in every case if either party serves on adverse counsel and files with the clerk of the appellate courts a request for it at the time of serving and filing the party's initial brief, unless:

1. oral argument is forfeited by respondent pursuant to Rule 128.02 of the Minnesota Rules of Civil Appellate Procedure for failure to timely file a brief and appellant has either waived oral argument or not requested it;

2. oral argument is waived pursuant to Rule 134.06; or

3. the appellate court determines in the exercise of its discretion that oral argument is unnecessary because:

a. the dispositive issue or set of issues has been authoritatively settled; or

b. the briefs and record adequately present the facts and legal arguments and the decisional process would not be significantly aided by oral argument.

The clerk of the appellate court shall notify the parties when it has been determined that oral argument shall not be allowed under this provision. Any party so notified may request the court to reconsider its decision by serving on all other parties and filing with the clerk of the appellate courts a written request for reconsideration within 5 days of receipt of the notification that no oral argument shall be allowed. If, under this provision, oral argument is not allowed, the case shall be considered as submitted to the court at the time the clerk of the appellate courts notifies the parties that oral argument has been denied.

The Court of Appeals may direct presentation of oral argument in any case.

(2) Procedure Upon Oral Argument. Except in exigent circumstances, the oral argument shall be heard before the full panel to which the case has been assigned, and in any event shall be considered and decided by the full panel. Except as otherwise provided by this rule, the procedure upon oral argument including waiver and forfeiture of oral argument shall be as set forth in the Minnesota Rules of Civil Appellate Procedure.

Comment—Rule 28

See comment following Rule 28.05.

Rule 28.03 Certification of Proceedings

If, upon the trial of any person convicted in any court, or if, upon any motion to dismiss a tab charge, complaint or indictment, or upon any motion relating to the tab charge, complaint, or indictment, any question of law shall arise which in the opinion of the judge is so important or doubtful as to require a decision of the Court of Appeals, the judge shall, if the defendant shall request or consent thereto, report the case, so far as may be necessary to present the question of law, and certify the report to the Court of Appeals, whereupon all proceedings in the case shall be stayed until the decision of the Court of Appeals. The prosecuting attorney shall, upon certification of the report, forthwith furnish a copy to the attorney general at the expense of the county. Other criminal cases in such trial court involving or depending upon the same question, may, if the defendant so requests, or consents thereto, be stayed in like manner until the decision of the case so certified. Unless otherwise provided by order of the appellate court, the filing and serving of briefs upon certification shall be as provided in Rule 28.04, subd. 2(3).

Comment—Rule 28

See comment following Rule 28.05.

Rule 28.04 Appeal by Prosecuting Attorney

Subd. 1. Right of Appeal. The prosecuting attorney may appeal as of right to the Court of Appeals:

(1) in any case, from any pretrial order of the trial court, including probable cause dismissal orders based on questions of law. However, an order is not appealable (a) if it is based solely on a factual determination dismissing a complaint for lack of probable cause to believe the defendant has committed an offense or (b) if it is an order dismissing a complaint pursuant to Minn. Stat. § 631.21; and

(2) in felony cases from any sentence imposed or stayed by the trial court; and

(3) in any case, from an order granting postconviction relief under Minn. Stat. Ch. 590; and

(4) in any case, from an order staying adjudication of an offense for which the defendant pleaded guilty or was found guilty at a trial. An order for a stay of adjudication to which the prosecuting attorney did not object is not appealable; and

(5) in any case, from a judgment of acquittal by the trial court entered after the

jury returns a verdict of guilty under Rule 26.03, subd. 17(2) or (3); and

(6) in any case, from an order of the trial court vacating judgment and dismissing the case made after the jury returns a verdict of guilty under Rule 26.04, subd. 2; and

(7) in any case, from an order for a new trial granted under Rule 26.04, subd. 1, after a verdict or judgment of guilty, if the trial court expressly states therein, or in a memorandum attached thereto, that the order is based exclusively upon a question of law which in the opinion of the trial court is so important or doubtful as to require a decision by the appellate courts. However, an order for a new trial is not appealable if it is based on the interests of justice.

Subd. 2. Procedure Upon Appeal of Pretrial Order. The procedure upon appeal of a pretrial order by the prosecuting attorney shall be as follows:

(1) Stay. Upon oral notice that the prosecuting attorney intends to appeal a pretrial order which shall also include a statement for the record as to how the trial court's alleged error, unless reversed, will have a critical impact on the outcome of the trial, the trial court shall order a stay of proceeding of five (5) days to allow time to perfect the appeal.

(2) Notice of Appeal. The prosecuting attorney shall file with the clerk of the appellate courts a notice of appeal, a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure which shall also include a summary statement by the prosecutor as to how the trial court's alleged error, unless reversed, will have a critical impact on the outcome of the trial, and a copy of the written request to the court reporter for such transcript of the proceedings as appellant deems necessary. The notice of appeal, the statement of the case, and request for transcript shall have attached at the time of filing, proof of service on the defendant or defense counsel, the State Public Defender, the attorney general for the State of Minnesota, and the court administrator of the trial court in which the pretrial order is entered. Failure to serve or file the statement of the case, to request the transcript, to file a copy of such request, or to file proof of service does not deprive the Court of Appeals of jurisdiction over the prosecuting attorney's appeal, but it is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal. The contents of the notice of appeal shall be as set forth in Rule 28.02, subd. 4(2).

(3) Briefs. Within fifteen (15) days of delivery of the transcripts, or within fifteen (15) days of the filing of the notice of appeal if the transcript was delivered prior to the filing of the notice of appeal or if the appellant has not requested any transcript under Rule 28.04, subd. 2(2), appellant shall file the appellant's brief with the clerk of the appellate courts together with proof of service upon the respondent. Within 8 days of service of appellant's brief upon respondent the respondent shall file the respondent's brief with said clerk together with proof of service upon the appellant. In all other respects the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the form and filing of briefs and appendices except that the appellant's brief shall contain a statement of the procedural history.

(4) Dismissal by Attorney General. In appeals by the prosecuting attorney, the attorney general may, within 20 days after entry of the order staying proceedings, dismiss the appeal and shall within 3 days thereafter give notice thereof to the judge of the lower court and file with the clerk of the appellate courts notice of such dismissal. The lower court shall then proceed as if no appeal had been taken.

(5) Oral Argument and Consideration. The provisions of Rule 28.02, subd. 13 concerning oral argument shall apply to appeals by the prosecuting attorney provided that the date of oral argument or submission of the case to the court without oral argument

shall not be more than 3 months after all briefs have been filed. The Court of Appeals shall not hear or accept as submitted any such appeals more than 3 months after all briefs have been filed and in such cases the lower court shall then proceed as if no appeal had been taken.

(6) Attorney's Fees. Reasonable attorney's fees and costs incurred shall be allowed to the defendant on such appeal which shall be paid by the governmental unit responsible for the prosecution involved.

(7) Joinder. The prosecuting attorney may appeal from one or several of the orders under this rule joined in a single appeal.

(8) Time for Appeal. The prosecuting attorney may not appeal under this rule until after the Omnibus Hearing has been held under Rule 11, or the evidentiary hearing and pretrial conference, if any, have been held under Rule 12, and all issues raised therein have been determined by the trial court. The appeal then shall be taken within 5 days after the defense, or the court administrator pursuant to Rule 33.03, subsequently serves notice of entry of the order appealed from upon the prosecuting attorney or within 5 days after the prosecuting attorney is notified in court on the record of such order, whichever occurs first. All pretrial orders entered and noticed to the prosecuting attorney prior to the trial court's final determination of all issues raised in the Omnibus Hearing under Rule 11, or the evidentiary hearing and pretrial conference under Rule 12, may be included in this appeal. An appeal by the prosecuting attorney under this rule bars any further appeal by the prosecuting attorney from any existing orders not included in the appeal. No appeal of a pretrial order by the prosecuting attorney shall be taken after jeopardy has attached.

An appeal under this rule does not deprive the trial court of jurisdiction over pending matters not included in the appeal.

Subd. 3. Cross-Appeal by Defendant. Upon appeal by the prosecuting attorney, the defendant may obtain review of any pretrial or postconviction order which will adversely affect the defendant, by filing a notice of cross-appeal with the clerk of the appellate courts, together with proof of service on the prosecuting attorney, within 10 days after service of notice of the appeal by the prosecuting attorney, provided that in postconviction cases the notice of cross-appeal may be filed within 60 days after the entry of the order granting or denying postconviction relief, if that is later. Failure to serve the notice does not deprive the Court of Appeals of jurisdiction over defendant's cross-appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the cross-appeal.

Subd. 4. Conditions of Release. Upon appeal by the prosecuting attorney of a pretrial order, the conditions for defendant's release pending the appeal shall be governed by Rule 6.02, subds. 1 and 2. The court shall also consider that the defendant, if not released, may be confined for a longer time pending the appeal than would be possible under the potential sentence for the offense charged.

Subd. 5. Proceedings in Forma Pauperis. An indigent defendant wishing the services of an attorney in an appeal taken by the prosecuting attorney under this rule shall proceed under Rule 28.02, subd. 5.

Subd. 6. Procedure Upon Appeal of Postconviction Order.

(1) Service and Filing. An appeal shall be taken by filing a notice of appeal with

the clerk of the appellate courts together with proof of service on the opposing counsel, the court administrator of the trial court in which the order appealed from is entered, and, when the appellant is not the attorney general, also the attorney general for the State of Minnesota. No fees or bond for costs shall be required for the appeal. Unless otherwise ordered by the appellate court, a certified copy of the order appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure need not be filed. Failure of the prosecuting attorney to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) Time for Taking an Appeal. An appeal by the prosecuting attorney of an order granting postconviction relief shall be taken within 60 days after entry of the order.

(3) Other Procedures. The provisions of Rule 28.02, subd. 4(2), concerning the contents of the notice of appeal, Rule 28.02, subd. 8, concerning the record on appeal, Rule 28.02, subd. 9, concerning transcript of the proceedings and transmission of the transcript on record, Rule 28.02, subd. 10, concerning briefs, Rule 28.02, subd. 13, concerning oral argument, Rule 28.04, subd. 2(4), concerning dismissal by the attorney general, and Rule 28.04, subd. 2(6), concerning attorney's fees, shall apply to appeals by the prosecuting attorney of an order granting postconviction relief.

Subd. 7. Procedure Upon Appeal From Order Staying Adjudication.

(1) Service and Filing. An appeal from an order staying adjudication shall be taken by filing a notice of appeal with the clerk of the appellate courts together with proof of service on opposing counsel, the court administrator of the trial court in which the order is entered, the State Public Defender, and when the appellant is not the attorney general, the attorney general of the State of Minnesota. The notice shall be accompanied by a copy of a written request to the court reporter for such transcript of the proceedings as appellant deems necessary. No fees or bond for costs shall be required for the appeal. Unless otherwise ordered by the appellate court, a certified copy of the order appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure need not be filed. Failure of the prosecuting attorney to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) Time for Taking an Appeal. An appeal by the prosecuting attorney from an order staying adjudication shall be taken within 10 days after entry of the order.

(3) Briefs. Within 15 days after delivery of the transcript, or within 15 days after the filing of the notice of appeal if the transcript was delivered prior to filing of the notice of appeal or if the appellant has not requested a transcript, the appellant shall file the appellant's brief with the clerk of the appellate courts together with proof of service upon the respondent. The brief shall be identified as a stay of adjudication brief. Within eight days after service of the appellant's brief, the respondent shall file the respondent's brief with the clerk together with proof of service upon the appellant. In all other respects, the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the form and filing of briefs and appendices except that the appellant's brief shall contain a statement of the procedural history.

(4) Other Procedures. The provisions of Rule 28.02, subd. 4(2), concerning the contents of the notice of appeal, Rule 28.02, subd. 5, concerning proceedings in forma pauperis, Rule 28.02, subd. 7, concerning release of the defendant pending appeal, Rule 28.02, subd. 8, concerning the record on appeal, and Rule 28.02, subd. 13, concerning

oral argument, shall apply to appeals by the prosecuting attorney from an order staying adjudication.

Subd. 8. Procedure Upon Appeal From Judgment of Acquittal or Vacation of Judgment After a Jury Verdict of Guilty, or From an Order Granting a New Trial.

(1) Service and Filing. An appeal shall be taken by filing a notice of appeal with the clerk of the appellate courts together with proof of service on the opposing counsel, the court administrator of the trial court in which the judgment or order appealed from is entered, and when the appellant is not the attorney general, also the attorney general for the State of Minnesota. No fees or bond for costs shall be required for the appeal. Unless otherwise ordered by the appellate court, a certified copy of the judgment or order appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure need not be filed. Failure of the prosecuting attorney to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) Time for Taking an Appeal. An appeal by the prosecuting attorney from either a judgment of acquittal after a jury verdict of guilty, or an order vacating judgment and dismissing the case after a jury verdict of guilty, or an order granting a new trial, shall be taken within 10 days after entry of the judgment or order.

(3) Stay and Conditions of Release. Upon oral notice that the prosecuting attorney intends to appeal from a judgment of acquittal after a jury verdict of guilty or from an order vacating judgment and dismissing the case after a jury verdict of guilty, or from an order granting a new trial, the trial court shall order a stay of execution of the judgment or order of ten (10) days to allow time to perfect the appeal. The trial court shall also determine the conditions for defendant's release pending the appeal, which conditions shall be governed by Rule 6.02, subds. 1 and 2.

(4) Other Procedures. The provisions of Rule 28.02, subd. 4(2), concerning the contents of the notice of appeal, Rule 28.02, subd. 8, concerning the record on appeal, Rule 28.02, subd. 9, concerning transcript of the proceedings and transmission of the transcript and record, Rule 28.02, subd. 10, concerning briefs, Rule 28.02, subd. 13, concerning oral argument, Rule 28.04, subd. 2(4), concerning dismissal by the attorney general, and Rule 28.04, subd. 2(6), concerning attorney's fees, shall apply to appeals by the prosecuting attorney from either a judgment of acquittal after a jury verdict of guilty or an order vacating judgment and dismissing the case after a jury verdict of guilty, or an order granting a new trial.

(5) Cross-Appeals. Upon appeal by the prosecuting attorney under this subdivision, the defendant may obtain review of any pretrial and trial orders and issues, by filing a notice of cross-appeal with the clerk of the appellate courts, together with proof of service on the prosecuting attorney, within 30 days of the prosecutor filing notice of appeal or within 10 days after delivery of the transcript by the reporter, whichever is later. If this election is made and the jury's verdict is ultimately reinstated, the defendant may not file a second appeal from the entry of judgment of conviction unless it is limited to issues, such as sentencing, that could not have been raised in the cross-appeal. The defendant may also elect to respond to the issues raised in the prosecutor's appeal and reserve appeal of any other issues until such time as the jury's verdict of guilty is reinstated. If reinstatement occurs, the defendant may appeal from the judgment using the procedures set forth in Rule 28.02, subd. 2.

Comment—Rule 28

See comment following Rule 28.05.

Rule 28.05 Appeal from Sentence Imposed or Stayed

Subd. 1. Procedure. The following procedures shall apply to the appeal of a sentence imposed or stayed as permitted by these rules:

(1) *Notice of Appeal and Briefs*. Any party appealing a sentence shall file with the clerk of the appellate courts, within 90 days after judgment and sentencing, (a) a notice of appeal and (b) an affidavit of service of the notice upon opposing counsel, the attorney general, the court administrator of the trial court in which the sentence was imposed or stayed, and in the case of prosecution appeals, the State Public Defender. If at the time of filing the notice of appeal all transcripts necessary for the appeal have already been transcribed, the party appealing the sentence shall file with the notice of appeal 9 copies of an informal letter brief, which shall be identified as a sentencing appeal brief, setting forth the arguments concerning the illegality or inappropriateness of the sentence along with an affidavit of service of the brief upon opposing counsel, the attorney general, and in the case of prosecution appeals, the State Public Defender. If at the time of filing the notice of appeal all transcripts necessary for the appeal have not yet been transcribed, the party appealing the sentence shall file with the notice of appeal a request for transcripts along with an affidavit of service of the request upon opposing counsel, the attorney general, the court administrator of the trial court in which the sentence was imposed or stayed, and in the case of prosecution appeals, the State Public Defender. Appellant's brief shall be identified as a sentencing appeal brief and shall be served and filed within 30 days of the delivery of the transcript. The clerk of the appellate courts shall not accept a notice of appeal from sentence unless accompanied by the requisite briefs or transcript request and affidavit of service. A defendant appealing the sentence and the judgment of conviction has the option of combining the two appeals into a single appeal; when this option is selected, the procedures established by Rule 28.02 of these rules shall continue to apply.

(2) *Transmission of Record.* Upon receiving a copy of the notice of appeal, the court administrator for the trial court shall immediately forward to the clerk of the appellate courts (a) a transcript of the sentencing hearing, if any, (b) the sentencing order with the departure report, if any, attached, (c) the sentencing guidelines worksheet, and (d) any presentence investigation report.

(3) *Respondent's Brief.* Within 10 days of service upon respondent of appellant's brief, a respondent choosing to respond shall serve an informal letter brief upon appellant and file with the clerk of the appellate courts 9 copies of such brief.

(4) *Other procedures.* The provisions of Rule 28.02, subd. 4(2) concerning the contents of the notice of appeal, Rule 28.02, subd. 5 concerning proceedings in forma pauperis, Rule 28.02, subd. 6 concerning stays, Rule 28.02, subd. 7 concerning the release of the defendant on appeal, and Rule 28.02, subd. 13 concerning oral argument shall apply to sentence appeals under this rule. The appellant may serve and file a reply brief within 5 days after service of the respondent's brief.

Subd. 2. Action on Appeal. On appeal of a sentence, the court may review the sentence imposed or stayed to determine whether the sentence is inconsistent with

statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the sentencing court. This review shall be in addition to all other powers of review presently existing. The court may dismiss or affirm the appeal, vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence or order further proceedings to be had as the court may direct.

Comment—Rule 28

Rule 28 governs the procedure for appeals to the Court of Appeals, Minn. Stat. Ch. 480A (1982), in all petty misdemeanor, misdemeanor, gross misdemeanor, and felony cases except for cases in which the defendant has been convicted of murder in the first degree. Appeals to the Supreme Court in criminal cases are permitted as a matter of right only when a defendant has been convicted of murder in the first degree, Minn. Stat. § 632.14 (1982), and the procedure in such cases is governed by Rule 29. Rule 29 also governs the procedure for seeking further discretionary review in the Supreme Court of any decision by the Court of Appeals. Minn. Stat. § 611A.0395 requires the prosecuting attorney to make a reasonable and good faith effort to notify a victim of any pending appeal, of any hearings or arguments on the appeal, and of the final decision.

The provision of Rule 28.01, subd. 3 for suspension of the rules is taken from Fed.R.App.P. 2 and Minn.R.Civ.App.P. 102. The court, however, may not extend the time for filing a notice of appeal except as provided by Rule 28.02, subd. 4(3).

Under Rule 28.02, subd. 1 the defendant may obtain review of lower court orders and rulings only by appeal except as may be provided in the case of the extraordinary writ authorized by Minn. Const. Art. VI, § 2, and the postconviction remedy, Minn. Stat. Ch. 590. The statutory authorization for the extraordinary writs is contained in Minn. Stat. § 480A.06, subd. 5 (1982) and Chapters 586 (Mandamus), 589 (Habeas Corpus), and 606 (Certiorari). The procedure for obtaining writs of mandamus or prohibition is contained in Minn.R.Civ.App.P. 120 and 121.

Under Rule 28.02, subd. 2(1) a defendant may appeal to the Court of Appeals from either a final judgment or an order denying postconviction relief except for cases in which the defendant has been convicted of murder in the first degree. The procedure for the appeal is governed by Rule 28 which supersedes the holding in Bolstad v. State, 439 N.W.2d 50 (Minn.Ct.App.1989) that the procedure in postconviction appeals is governed by the Rules of Civil Appellate Procedure. See Rules 28.04, subd. 1 and 28.04, subd. 6 as to appeal by the prosecuting attorney in postconviction cases. These rules supersede Minn. Stat. § 590.06 (1988) concerning the procedure for an appeal from a postconviction order.

The provisions in Rule 28.02, subd. 2(2) concerning a defendant's right to appeal from an order refusing or imposing conditions of release is taken from Fed.R.App.P. 9(a) and 18 U.S.C. § 3147(b). The remaining provisions of Rule 28.02, subd. 2(1) and (2) are taken substantially from ABA Standards, Criminal Appeals, 21-1.3 (Approved Draft, 1979). Subdivision 2(2)(3) provides defendants with the ability to appeal an order denying a double jeopardy based motion for dismissal after a first trial has ended by mistrial. This provision avoids forcing a defendant to stand trial for a second time for the same offense, one of the principle (sic) concerns of double jeopardy protection, State v. McDonald, 298 Minn. 449, 452, 215 N.W.2d 607, 609 (1974), without first permitting appellate review of the double jeopardy issue. Rule 28.02, subd. 2(3) giving a defendant

the right to appeal any sentence imposed or stayed in a felony case is based on Minn. Stat. § 244.11 (1982). Under Rule 28.04, subd. 1(2) the prosecuting attorney also has a right to appeal from a sentence imposed or stayed. Under Rule 27.04, subd. 3(5) either the defendant or the prosecuting attorney may also appeal from the court's decision in a probation revocation proceeding. A defendant cannot as a matter of right appeal from a stay of adjudication entered pursuant to Minn. Stat. § 152.18, subd. 1, which statute requires the consent of the defendant. However, a defendant may seek discretionary appeal from such a stay under Rule 28.02, subd. 3. State v. Verschelde, 595 N.W.2d 192 (Minn. 1999).

Rule 28.02, subd. 3 (Discretionary Appeal) is taken from Minn.R.Civ.App.P. 105 which sets forth the procedure to be followed by a defendant in seeking permission to proceed with an appeal from an order not otherwise appealable. A defendant seeking to appeal from a sentence imposed or stayed in a misdemeanor or gross misdemeanor case would have to proceed under this rule.

Under Rule 28.02, subd. 4 (Procedure for Appeals Other Than Sentencing Appeals) the method for perfecting an appeal to the Court of Appeals is similar to that provided in Minn.R.Civ.App.P. 103.01 except that it is not necessary to file a certified copy of the judgment or order appealed from, a statement of the case, or a bond. Timely filing of the notice with the clerk of the appellate courts is the jurisdictional prerequisite for the appeal. However, failure to take the other actions required by the rule could result in dismissal of the appeal or some lesser sanction as the Court of Appeals deems appropriate.

Under Rule 28.02, subd. 4(3) (Time for Taking an Appeal) a timely motion for a new trial (Rule 26.04, subd. 1(3)), a motion for judgment of acquittal (Rule 26.03, subd. 17(3)), or motion to vacate judgment (Rule 26.04, subd. 2) delays the start of the time period for taking an appeal from the judgment until entry of the order denying the motion. The provisions for extension of time for taking an appeal are based on Fed.R.App.P. 4(b).

Rule 28.02, subd. 4(4) establishes a procedure by which a defendant who has initiated a direct appeal may nonetheless pursue postconviction relief. Certain types of claims are better suited to the taking of testimony and fact-finding possible in the district court, and defedants are encouraged to bring such claims, such as ineffective assistance of counsel where explanation of the attorney's decision is necessary, through postconviction proceedings rather than through direct appeal. See Black v. State, 560 N.W.2d 83, 85 n.1 (Minn. 1997). The order staying the appeal may provide for a time limit within which to file the postconviction proceeding.

Rule 28.02, subd. 5 (Proceedings in Forma Pauperis) sets forth the procedures for an indigent defendant to follow to obtain the assistance of the State Public Defender with an appeal or postconviction proceeding. See Minn. Stat. § 611.25 (1982) as to the powers and duties of the State Public Defender.

Rule 28.02, subd. 5, also sets forth the method for temporarily making transcripts available to defendants seeking to proceed pro se or to file a supplemental brief on appeal. As to the right of a defendant to proceed pro se on appeal and to obtain a transcript for that purpose see State v. Seifert, 423 N.W.2d 368 (Minn. 1988). The procedure established by the rule contains elements of both the majority and dissenting

opinions in that case. The rule allows a defendant to proceed pro se on appeal and to obtain a copy of any necessary transcript, but only after the State Public Defender has first had an opportunity to file a brief on behalf of the defendant and provided a copy of that brief to the defendant. This procedure satisfies the right of a defendant to proceed pro se while also assuring that any valid legal arguments will be brought to the attention of the appellate court by competent legal counsel. The State Public Defender's office will confer with the defendant and advise the defendant of the dangers and consequences of proceeding without legal counsel. If the defendant chooses to proceed, the State Public Defender's office will obtain a waiver of counsel from the defendant. If there is doubt as to the defendant's competency to waive counsel, the State Public Defender's office will assist in seeking an order from the district court determining the defendant's competency or incompetency. Upon receiving the transcript, the defendant must sign a receipt acknowledging the obligation to return the transcript to the State Public Defender's office when the time to file the supplementary brief expires. The transcript remains the property of the State Public Defender's office and any supplementary brief will not be accepted by the appellate court until the State Public Defender files a receipt with the appellate court indicating that the transcript has been returned. The recommended forms appended to the rules contain forms for waiver of counsel, request for determination of competency, and receipts of transcript by and from the defendant that satisfy the requirements of these rules. Part (7) sets forth the procedure through which an indigent person represented don appeal by private counsel obtains a transcript at public expense. It reflects the ruling and procedure set out in State v. Pederson, 600 N.W.2d 451 (Minn. 1999). Part (7)(c) addresses the method of resolving disputes between the State Public Defender and the private attorney about what parts of the transcript should be ordered. The "appropriate" court for resolving disputes is the appellate court in which the appeal is filed. In the event an evidentiary hearing or extensive fact finding is required to resolve the dispute, the appellate court may order the issue be resolved by the district court in which the case was originally filed. In any case in which the entire transcript is not ordered, the procedure set forth in Rule 28.02, subd. 9, must be followed to permit the respondent to order additional parts of the transcript. Part (8), which requires court administrators to furnish to the State Public Defender copies of any documents in their possession without charge, is in accord with Minnesota Statutes, section 611.271. Under part (10) of Rule 28.02, subd. 5, the State Public Defender is not obligated to pay for transcripts or other expenses for a misdemeanor appeal if that office has not agreed under part (5) of that rule to represent the defendant in such a case.

Rule 28.02, subd. 7(1), (2), and (3) (Release of Defendant, Burden of Proof, and Application for Release Pending Appeal) are adapted from ABA Standards, Criminal Appeals, 21-2.5(a) and (b) (Approved Draft, 1979), Fed.R.App.P. 9(b) and (c), and 18 U.S.C. § 3148.

Rule 28.02, subd. 8 (Record on Appeal) is based on Minn.R.Civ.App.P. 110.01 and 110.04.

Under Rule 28.02, subd. 9 (Transcript of Proceedings and Transmission of the Transcript and Record) the transcript must be ordered within 30 days after filing of the notice of appeal rather than within 10 days as otherwise provided by Minn.R.Civ.App.P. 110.02, subd. 1. The other provisions of Minn.R.Civ.App.P. 110 and 111 concerning the content and transmission of the record and transcripts apply to criminal appeals under Rule 28. It is therefore necessary in a criminal appeal upon ordering the transcript to serve and file a Certificate as to Transcript as required by Minn.R.Civ.App.P. 110.02,

subd. 2. If the parties have stipulated to the accuracy of a transcript of videotape or audiotape exhibits and made it part of the trial court record, that becomes part of the record on appeal and it is not necessary for the court reporter to transcribe the exhibits. If no such transcript exists, a transcript need not be prepared unless expressly requested by the appellant or the respondent. The exhibit then must be transcribed, but the court reporter need not certify the correctness of the exhibit transcript as is otherwise required for the remainder of the transcript under Rule 110.02, subd. 4 of the Rules of Civil Appellate Procedure. This exception is made because of the difficulties often encountered in preparing such a transcript. If either of the parties questions the accuracy of the court reporter's transcript of a videotape or audiotape exhibit that party may seek to correct the transcript either by stipulation with the other party or by motion to the trial court under Rule 110.05 of the Rules of Civil Appellate Procedure.

Rule 28.02, subd. 10 (Briefs) establishes time limits for serving and filing briefs in criminal cases different from that provided by Minn.R.Civ.App.P. 131.01 for civil cases. Also, the appellant's initial brief in a criminal case, unlike in a civil case, must contain a statement of the procedural history. Otherwise, the provisions of Minn.R.Civ.App.P. 128, 129, 130, 131, and 132 concerning the form and filing of briefs govern in the appeal of a criminal case.

Rule 28.02, subd. 11 (Scope of Review) is adapted from Minn.R.Civ.App.P. 103.04 except that on appeal from the final judgment it permits review of pretrial and trial orders or rulings whether or not a motion for new trial has been made, and timely post-trial motions may be reviewed whether ruled upon before or after judgment.

A party appealing to the Court of Appeals does not automatically receive oral argument. Rather, Rule 28.02, subd. 13(1) (Right to Oral Argument) requires a party desiring oral argument to serve and file with the initial brief a written request for the argument. If oral argument is requested, it shall be granted unless one of the three grounds set forth in the rule exists. The first two grounds of waiver and forfeiture are taken from Minn.R.Civ.App.P. 134.01. The final ground permitting denial of oral argument is based on Minn.R.Civ.App.P. 134.01 and Rule 10(d) of the Eighth Circuit Rules of Appellate Procedure.

Pursuant to Minn. Stat. § 480A.08, subd. 3, the Court of Appeals shall decide every case within 90 days after oral argument or final submission of briefs, whichever is later. If oral argument is denied under Rule 28.02, subd. 13(1)3 the case shall be considered as submitted to the court at the time the clerk so notifies the parties. If oral argument is not held because it was not requested by the parties or was waived or forfeited by them, then the date upon which the case is considered submitted to the court is determined under Minn.R.Civ.App.P. 134.06. Under Minn.R.Civ.App.P. 134.06 waiver of oral argument requires the consent of the court as well as the agreement of the parties.

Rule 28.03 (Certification of Proceedings) is based upon former Minn. Stat.§ 632.10 which was repealed in 1979.

Rule 28.04 (Appeal by Prosecuting Attorney) sets forth the right and the procedure for the prosecuting attorney to appeal to the Court of Appeals. Rule 28.04, subd. 1(1) makes it clear that under case law decided since the original adoption of the rules prosecutors may appeal from dismissals for lack of probable cause if such orders are based on questions of law. See, e.g., State v. Aarsvold, 376 N.W.2d 518 (Minn. App.

1985), rev. denied (Minn. Dec. 30, 1985); State v. Kiminski, 474 N.W.2d 385, 388-89 (Minn. App. 1991), rev. denied (Minn. Oct. 11, 1991); and State v. Lores, 512 N.W.2d 618, 620 (Minn. App. 1994), rev. denied (Minn. April 28, 1994). The right of the prosecuting attorney under Rule 28.04, subd. 1(2) to appeal from a sentence imposed or stayed in a felony is based on Minn. Stat. § 244.11 (1982). The procedure for such sentencing appeal is set forth in Rule 28.05. The prosecutor's right to appeal from a trial court's judgment of acquittal after a jury returns a verdict of guilty, or from a trial court's order vacating judgment and dismissing the case after a jury returns a verdict of guilty, does not offend the constitutional protection against double jeopardy because a reversal of the trial court's order on appeal would merely reinstate the jury's verdict and would not subject the defendant to another trial, United States v. Wilson, 420 U.S. 332, 344-45, 95 S.Ct. 1013, 1022-23(1975). The defendant may elect to appeal any orders or issues arising in the course of the criminal process by filing a cross-appeal.

To the extent that an order granting a defendant a new trial also suppresses evidence, it will be viewed as a pretrial order concerning the retrial and the prosecuting attorney may appeal the suppression part of the order under Rule 28.04, subd. 1(1). State v. Brown, 317 N.W.2d 714 (Minn.1982). In response to State v. Lee, 706 N.W.2d 491 (Minn. 2005), Rule 28.04, subd. 1(4), was revised to expressly permit a prosecuting attorney to appeal a stay of adjudication ordered by the district court over the objection of the prosecuting attorney. Prior to that revision, such appeals were permitted by construing the appeal in misdemeanor and gross misdemeanor cases as an appeal from a pretrial order under part (1) and in felony cases as an appeal from a sentence under part (2). See State v. Hoelzel, 639 N.W.2d 605 (Minn. 2002); State v. Verschelde, 595 N.W.2d 192 (Minn. 1999); State v. Thoma, 571 N.W.2d 773 (Minn. 1997), aff'g 569 N.W.2d 205 (Minn. App. 1997); and State v. Wright, 699 N.W.2d 782 (Minn. App. 2005). A good faith timely motion by the prosecuting attorney for clarification or rehearing of an appealable order extends the time to appeal from that order. State v. Wollan, 303 N.W.2d 253 (Minn.1981). Originally under Rules 28.04, subd. 2(2) and (8) the prosecuting attorney had five days from entry of an appealable pretrial order to perfect the appeal. It was possible for this short time limit to expire before the prosecuting attorney received actual notice of the order sought to be appealed. These rules as revised eliminate this unfairness and assure that notice of the pretrial order will be served on or given to the prosecuting attorney before the five-day time limit begins to run. In State v. Hugger, 640 N.W.2d 619 (Minn. 2002), the court held that in computing the five-day time period within which an appeal must be taken under Rule 28.04, subd. 2(8), intermediate Saturdays, Sundays, and legal holidays shall be excluded pursuant to Rule 34.01 before the additional three days for service by mail is added pursuant to Rule 34.04.

Generally, absent special circumstances, failure of the prosecuting attorney to file the appellant's brief within the 15 days as provided by Rule 28.04, subd. 2(3) will result in dismissal of the appeal. State v. Schroeder, 292 N.W.2d 758 (Minn.1980); State v. Olson, 294 N.W.2d 320 (Minn.1980); State v. Weber, 313 N.W.2d 387 (Minn.1981). CRITICAL IMPACT REQUIREMENT. Although the prosecutor need no longer submit with the notice of appeal the statement formerly required by Minn. Stat. § 632.12, the prosecutor is required by the court's decisions in State v. Webber, 262 N.W.2d 157 (Minn.1977), State v. Helenbolt, 280 N.W.2d 631 (Minn.1979), and State v. Fisher, 304 N.W.2d 33 (Minn.1981) to show on appeal that the trial court clearly and unequivocally erred and that, unless reversed, the error will have a critical impact on the outcome of the trial. The rule requires prosecutors to articulate their position on critical impact

both in the oral notice to the trial court of intent to appeal (under Rule 28.04, subd. 2(1)), and in the statement of the case to the Court of Appeals (under Rule 28.04, subd. 2(2)).

Rule 28.04, subd. 2(2), requires that the prosecuting attorney serve the notice of appeal, the statement of the case, and the request for transcript on the defendant or defense counsel, the State Public Defender, the attorney general for the State of Minnesota, and the court administrator. Failure to timely serve the notice of appeal on the State Public Defender is a jurisdictional defect requiring dismissal of the appeal. State v. Barrett, 694 N.W.2d 783 (Minn. 2005).

Rule 28.04, subd. 6, which establishes the procedure for an appeal by the prosecuting attorney from an adverse order in a postconviction case, supersedes the holding in Bolstad v. State, 439 N.W.2d 50 (Minn.Ct.App.1989) that the procedure in such cases is governed by the Rules of Civil Appellate Procedure. The 60 day time limit for taking such an appeal is the same as was provided by Minn. Stat. § 590.06 which is now superseded by these rules.

Rule 28.05 (Appeal from Sentence Imposed or Stayed) is taken from the order of the Minnesota Supreme Court dated February 28, 1980. These appeal procedures are necessary because Minn. Stat. § 244.11 (1982) now authorizes both the defendant and the prosecution to appeal from any sentence imposed or stayed by the court for felony offenses occurring on or after May 1, 1980. Permitting the state to appeal a sentence does not violate the constitutional protection against double jeopardy. United States v. DiFrancesco, 449 U.S. 117, 101 S.Ct. 426, 66 L.Ed.2d 328 (1980).

Under Rule 28.05, subd. 1(1) a defendant may combine an appeal of the sentence with an appeal of the judgment of conviction. If the defendant later determines not to challenge the conviction, the sentence alone may still be challenged on the appeal and the more formal procedural requirements of Rule 28.02 then apply rather than that of Rule 28.05.

Rule 28.05, subd. 2 (Action on Appeal) is taken from Minn. Stat. § 244.11 (1982).

Rule 29. Appeals to Supreme Court

Rule 29.01 Scope of Rule

Subd. 1. Appeals from Court of Appeals and in First Degree Murder Cases. Rule 29 governs the procedure in misdemeanor, gross misdemeanor, and felony cases for appeals from the Court of Appeals to the Supreme Court and from the district court to the Supreme Court in cases in which the defendant has been convicted of murder in the first degree.

Subd. 2. Applicability of Rules of Civil Appellate Procedure. Except as otherwise provided in these rules, the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern appellate procedure in such cases.

Subd. 3. Suspension of Rules. In the interest of expediting decision, or for other good cause shown, the Supreme Court may suspend the requirements or provisions of any of these rules in a particular case on application of any party or on its own motion and may order proceedings in accordance with its direction, but the Supreme Court may

not alter the time for filing notice of appeal or filing a petition for review except as provided by these rules.

Comment—Rule 29

See comment following Rule 29.06.

Rule 29.02 Right of Appeal

Subd. 1. Appeals in First Degree Murder Cases. A defendant may appeal as of right from the district court to the Supreme Court from a final judgment of conviction of murder in the first degree. Either the defendant or the prosecuting attorney may appeal as of right from the district court to the Supreme Court, in a first degree murder case, from an adverse final order upon a petition for postconviction relief under Minn. Stat. Ch. 590. The prosecuting attorney may appeal as of right from the district court to the Supreme Court, in a first degree murder case, from either a judgment of acquittal after a jury verdict of guilty of first degree murder or an order vacating judgment and dismissing the case after a jury verdict of guilty of first degree murder, or from an order granting a new trial under Rule 26.04, subd. 1, after a verdict or judgment of guilty of first degree murder, if the trial court expressly states therein, or in a memorandum attached thereto, that the order is based exclusively upon a question of law which in the opinion of the trial court is so important or doubtful as to require a decision by the appellate courts, except that an order for a new trial is not appealable if based on the interests of justice. Upon the appeal other charges which were joined for prosecution with the first degree murder charge may be included. Except as otherwise provided in Rule 118 of the Rules of Civil Appellate Procedure for accelerated review by the Supreme Court of cases pending in the Court of Appeals, there shall be no other direct appeals from the district court to the Supreme Court.

Subd. 2. Appeals from Court of Appeals. A party may appeal from a final decision of the Court of Appeals to the Supreme Court only with leave of the Supreme Court.

Comment—Rule 29

See comment following Rule 29.06.

Rule 29.03 Procedure for Appeals by Defendant in First Degree Murder Cases

Subd. 1. Service and Filing. An appeal shall be taken by filing a notice of appeal to the Supreme Court with the clerk of the appellate courts together with proof of service on the prosecuting attorney, the attorney general for the State of Minnesota, and the clerk of the trial court in which the judgment appealed from is entered. A bond shall not be required of a defendant for exercising the right to appeal. Unless otherwise ordered by the Supreme Court, defendant need not file a certified copy of the judgment appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure. Failure of the defendant to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems necessary, including dismissal of the appeal.

Subd. 2. Contents of Notice of Appeal. The notice of appeal shall specify the

defendant taking the appeal; shall give the names, addresses, and telephone numbers of all counsel and indicate whom they represent; shall designate the judgment or postconviction order from which appeal is taken; and shall state that the appeal is to the Supreme Court.

Subd. 3. Time for Taking an Appeal. An appeal by a defendant from a final judgment of conviction of murder in the first degree shall be taken within 90 days after the final judgment. A judgment shall be considered final within the meaning of these rules when there is a judgment of conviction upon the verdict of a jury or the finding of the court, and sentence is imposed. A notice of appeal filed after the announcement of a decision, or order, but before sentencing or entry of judgment shall be treated as filed after such sentencing or entry and on the day thereof. If a timely motion to vacate the judgment, for judgment of acquittal, or for a new trial has been made, the time for an appeal from a final judgment does not begin to run until the entry of an order denying the motion, and the order denying the motion may be reviewed upon appeal from the judgment.

An appeal by a defendant from an adverse final order in a postconviction proceeding in a first degree murder case shall be taken within 60 days after entry of that order.

A judgment or order is entered within the meaning of these appellate rules when it is entered upon the record of the clerk of the trial court.

For good cause the trial court or a justice of the Supreme Court may, before or after the time for appeal has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed herein for appeal.

Subd. 4. Other Procedures. The provisions of Rule 28.02, subd. 4(4), concerning stay of appeal for postconviction proceedings, Rule 28.02, subd. 5, concerning proceedings in forma pauperis, Rule 28.02, subd. 6, concerning stays, Rule 28.02, subd. 7, concerning release of defendant, Rule 28.02, subd. 9, concerning the transcript of proceedings and transmission of the transcript and record, Rule 28.02, subd. 10, concerning briefs, Rule 28.02, subd. 11, concerning the scope of review, Rule 28.02, subd. 12, concerning action on appeal, and Rule 29.04, subd. 9, concerning oral argument shall apply to appeals in first degree murder cases under this rule.

Comment—Rule 29

See comment following Rule 29.06.

Rule 29.04 Procedure for Appeals from Court of Appeals

Subd. 1. Service and Filing. A party petitioning for review to the Supreme Court from the Court of Appeals shall file four copies of a petition for review with the clerk of the appellate courts together with proof of service on adverse counsel and, when the petitioning party is not the attorney general, also proof of service on the attorney general for the State of Minnesota. A bond shall not be required of a defendant as a condition of petitioning for review. Failure of a party to take any other step than timely filing the petition for review does not affect the validity of the appeal, but is ground only for such

action as the Supreme Court deems appropriate including dismissal of the appeal.

Subd. 2. Time for Petitioning. A party petitioning for review to the Supreme Court from the Court of Appeals shall serve and file the petition for review within 30 days after the filing of the Court of Appeals' decision.

A judge of the Court of Appeals or a justice of the Supreme Court may for good cause, before or after the time to serve and file a petition for review has expired, with or without motion or notice, extend the time for serving and filing such a petition for a period not to exceed 30 days from the expiration of the time otherwise prescribed herein for that purpose.

Subd. 3. Contents of Petition for Review. The petition for review shall not exceed 10 pages exclusive of the appendix and shall identify the petitioner, state that petitioner is seeking permission to appeal to the Supreme Court from the Court of Appeals and contain in order the following information:

(1) the names, addresses, and telephone numbers of the attorneys for all parties;
(2) the date the decision of the Court of Appeals was filed and a designation of the judgment or order from which petitioner had appealed to the Court of Appeals;
(3) a concise statement of the legal issue or issues presented for review along with an indication of how each issue was decided in the trial court and in the Court of Appeals;

(4) a procedural history of the case from commencement of prosecution through filing of the decision in the Court of Appeals including a designation of the trial court and trial judge and the disposition of the case in the trial court and in the Court of Appeals;
(5) a concise statement of facts indicating briefly the nature of the case and including only those facts relevant to the issue or issues sought to be reviewed;
(6) a concise statement of the reasons why the Supreme Court should exercise its discretion to review the case; and
(7) an appendix containing a copy of the written decision of the Court of Appeals and a copy of any recitation of the essential facts of the case, conclusions of law, and memoranda relating thereto from the trial court.

Subd. 4. Discretionary Review. Review of any decision of the Court of Appeals is discretionary with the Supreme Court. The following criteria may be considered:

(1) the question presented is an important one upon which the Supreme Court should rule;
(2) the Court of Appeals has ruled on the constitutionality of a statute;
(3) the Court of Appeals has decided a question in direct conflict with an applicable precedent of a Minnesota appellate court;
(4) the lower courts have so far departed from the accepted and usual course of justice as to call for an exercise of the Supreme Court's supervisory powers; or
(5) a decision by the Supreme Court will help develop, clarify, or harmonize the law; and
1. the case calls for the application of a new principle or policy;
2. the resolution of the question presented has possible statewide impact; or
3. the question is likely to recur unless resolved by the Supreme Court.

Subd. 5. Response to Petition. When a petition for review has been filed, the opposing party shall file four copies of any response to the petition, not to exceed 10 pages exclusive of the appendix, with the clerk of the appellate courts together with proof of service on appellant within 20 days after service of the petition upon respondent. Failure to respond to the petition shall not be considered as agreement with the petition.

Subd. 6. Cross-Petition by Respondent. A respondent cross-petitioning for review to the Supreme Court shall file four copies of a cross-petition for review, not to exceed 10 pages exclusive of the appendix, with the clerk of the appellate courts together with proof of service on appellant within 20 days after service of the petition for review on respondent or within 30 days after filing of the decision of the Court of Appeals, whichever is later. The cross-petition shall conform to the requirements of Rule 29.04, subd. 3, except that the procedural history, statement of facts, and appendix need not be included unless respondent is dissatisfied with them as they appear in the petition for review.

The court may permit a respondent, without filing a cross-appeal, to defend a decision or judgment on any ground that the law and record permit that would not expand the relief that has been granted to the respondent.

Subd. 7. Action on Petition or Cross-Petition. The Supreme Court shall issue and file its order granting or denying permission to appeal or cross-appeal within 60 days of the date the petition is filed. Upon the filing of the order, the clerk of the appellate courts shall mail a copy of it to the attorneys for the parties.

Subd. 8. Briefs. Except as otherwise provided in subd. 10 of this rule, appellant shall serve and file the appellant's brief and appendix within 30 days after entry of the order granting permission to appeal and respondent shall serve and file the respondent's brief and appendix, if any, within 30 days after service of the brief of appellant. The appellant may serve and file a reply brief within 10 days after service of the respondent's brief. The Rules of Civil Appellate Procedure to the extent applicable shall otherwise govern the form and filing of briefs except that appellant's brief shall also include a statement of the procedural history.

Subd. 9. Oral Argument. Each party shall serve and file with the party's initial brief a notice stating whether oral argument is requested. Oral argument shall be granted unless the court determines it is unnecessary because:

(1) neither party has requested oral argument in the notice served and filed with the initial briefs;
(2) oral argument is forfeited pursuant to Rule 128.02 of the Rules of Civil Appellate Procedure; or
(3) oral argument is waived pursuant to Rule 134.06 of the Rules of Civil Appellate Procedure.

The Supreme Court may direct presentation of oral argument in any case.

Subd. 10. Appeals Involving Pretrial Orders.

(1) Briefs. In cases originally appealed to the Court of Appeals by the prosecuting attorney pursuant to Rule 28.04, the appellant shall within fifteen (15) days

from the date of entry of the order granting permission to appeal serve the appellant's brief upon opposing counsel and file with the clerk of the appellate courts 14 copies thereof. Within eight (8) days of such service on respondent, respondent shall serve the respondent's brief upon appellant and file 14 copies thereof with said clerk.

(2) Hearing. Additionally in such cases the date of oral argument or submission of the case to the court without oral argument shall not be more than three months after all briefs have been filed. The Supreme Court shall not hear or accept as submitted any such appeal more than three months after all briefs have been filed and in such cases the lower court shall then proceed pursuant to the judgment of the Court of Appeals as if no further appeal had been taken to the Supreme Court.

(3) Attorney's Fees. Reasonable attorney's fees and costs incurred shall be allowed to the defendant on an appeal to the Supreme Court by the prosecuting attorney in a case originally appealed by the prosecuting attorney to the Court of Appeals pursuant to Rule 28.04. Such fees shall be paid by the governmental unit responsible for the prosecution involved.

(4) Conditions of Release. Upon an appeal to the Supreme Court in a case originally appealed by the prosecuting attorney pursuant to Rule 28.04, the conditions for defendant's release pending the appeal shall be governed by Rule 6.02, subd. 1 and subd. 2.

Subd. 11. Other Procedures. The provisions of Rule 28.02, subd. 4(4), concerning stay of appeal for postconviction proceedings, Rule 28.02, subd. 5, concerning proceedings in forma pauperis, Rule 28.02, subd. 6, concerning stays, Rule 28.02, subd. 7, concerning release of defendant, Rule 28.02, subd. 8, concerning record on appeal, Rule 28.02, subd. 11, concerning the scope of review, and Rules 28.02, subd. 12 and 28.05, subd. 2, concerning action on appeal shall apply to appeals to the Supreme Court from the Court of Appeals.

Comment—Rule 29

See comment following Rule 29.06.

Rule 29.05 Procedure for Appeals by the Prosecuting Attorney in Postconviction Cases

Upon an appeal to the Supreme Court by the prosecuting attorney from an adverse final order of the district court in postconviction proceedings in a first degree murder case, the provisions of Rule 28.04, subd. 6 shall apply.

Comment—Rule 29

See comment following Rule 29.06.

Rule 29.06 Procedure for Appeals by the Prosecuting Attorney from a Judgment of Acquittal or Vacation of Judgment after a Jury Verdict of Guilty, or From an Order Granting a New Trial

Upon an appeal to the Supreme Court by the prosecuting attorney from either a judgment of acquittal after a jury verdict of guilty, or an order vacating judgment and dismissing the case after a jury verdict of guilty, or from an order granting a new trial, in a first degree murder case, the provisions of Rule 28.04, subd. 8 shall apply.

Comment—Rule 29

Rule 29 governs the procedure for discretionary appeals from the Court of Appeals to the Supreme Court and for appeals as of right from the district court to the Supreme Court in cases in which the defendant has been convicted of murder in the first degree.

Rule 29.01, subd. 3 (Suspension of Rules) is similar to Rule 28.01, subd. 3 governing the Court of Appeals and is taken from Fed.R.App.P. 2 and Minn.R.Civ.App.P. 102. The court, however, may not extend the time for filing a notice of appeal or a petition for review except as provided by Rules 29.03, subd. 3 and 29.04, subd. 2.

Under Rule 29.02, subd. 1 (Appeals in First Degree Murder Cases), Minn. Stat. § 590.06 (1988), and Minn. Stat. § 632.14 (1988) direct appeals from the district court to the Supreme Court in criminal cases are permitted only from either a final judgment of conviction of murder in the first degree or an adverse final order in a postconviction proceeding in such a case. Only the defendant may appeal from a final judgment of conviction, but either party may appeal from an adverse final order in a post conviction proceeding. The prosecutor may also appeal from a trial court's judgment of acquittal after a jury returns a verdict of guilty, or from a trial court's order vacating judgment and dismissing the case after a jury returns a verdict of guilty, without violating the constitutional protection against double jeopardy. United States v. Wilson, 420 U.S. 332, 344-45, 95 S.Ct. 1013, 1022-23 (1975). Other charges which were joined for prosecution with the first degree murder charge may be included on the appeal. Rule 29.02, subd. 1 permits an appeal only from final judgment as defined in Rule 29.02, subd. 3. Therefore, appeals of any matters in a first degree murder prosecution arising before final judgment, such as an appeal by the prosecuting attorney of a pretrial order, should go to the Court of Appeals under Rule 28 initially.

Under Rule 29.02, subd. 2 (Appeals from Court of Appeals), the discretionary appeal to the Supreme Court is taken from the decision of the Court of Appeals. The procedure for such an appeal is set forth in Rule 29.04.

The procedure for appeals in first degree murder cases as set forth in Rule 29.03 is basically the same as that set forth in Rule 28.02 for appeals to the Court of Appeals by defendants in all other criminal cases. See the comments on Rule 28.02 for explanations of those provisions that are similar. Oral argument on the appeal of a first degree murder case is governed by Rule 29.04, subd. 3 and the comments to that rule also apply.

The discretionary appeal to the Supreme Court under Rule 29.04 (Procedure for Appeals from Court of Appeals) is taken from the final decision of the Court of Appeals. The time limits specified in Rule 29.04, subd. 2 (Time for Petitioning) for filing a petition for review run from the date of filing of that final decision with the clerk of the appellate courts. The clerk of the appellate courts is required by Minn.R.Civ.App.P. 136.01, subd. 2 to mail copies of the final decision to the attorneys for the parties and to the trial court when the Court of Appeals files its decision.

Under Minn.R.Civ.App.P. 136.02 the clerk of the appellate courts is to enter judgment pursuant to the decision of the Court of Appeals not less than 30 days after that decision is filed. The filing of a petition for review under Rule 29.04 stays entry of the

judgment and transmission of the judgment back to the clerk of the trial court according to Minn.R.Civ.App.P. 136.02 and 136.03. If the petition for review is denied, the judgment is to be entered and transmitted immediately.

Rule 29.04, subd. 2 (Time for Petitioning) provides the time limit for petitioning the Supreme Court for review of a decision by the Court of Appeals. In such cases either the defendant or the prosecuting attorney can petition for review to the Supreme Court from an adverse decision in the Court of Appeals. This includes appeals in postconviction cases that were originally appealed to the Court of Appeals.

The criteria set forth in Rule 29.04, subd. 4 (Discretionary Review) to be considered by the Supreme Court in deciding whether to grant a petition for review are the same as those set forth in Minn.R.Civ.App.P. 117, subd. 2. The rule is based in part on Minn. Stat. § 480A.10, subd. 1 (1982).

The provision in Rule 29.04, subd. 6 (Cross-Petition by Respondent) permitting a respondent to defend a decision or judgment on any ground that the law and record permit even without filing a cross-petition is taken from Rule 10.5 of the Rules of the Supreme Court of the United States.

The 60-day time limit for granting or denying permission to appeal as provided in Rule 29.04, subd. 7 (Action on Petition or Cross-Petition) is taken from Minn. Stat. § 480A.10, subd. 1 (1982).

Except as provided by Rule 29.04, subd. 10 (Appeals Involving Pretrial Orders), the time limits for serving and filing briefs under Rule 29.04, subd. 8 (Briefs) are the same as provided in Minn.R.Civ.App.P. 131.01 for civil cases. See Minn.R.Civ.App.P. 128, 129, 130, 131, and 132 for other provisions governing the form and filing of briefs in a criminal case.

Rule 29.04, subd. 9 (Oral Argument) is based on Minn.R.Civ.App.P. 134.01. See Minn.R.Civ.App.P. 134.02, 134.03, 134.04, 134.05, 134.06, 134.07, and 134.08 for other provisions governing oral argument in a criminal case.

Rule 29.04, subd. 10 (Appeals Involving Pretrial Orders) provides additional limitations upon appeals to the Supreme Court for cases which were originally appealed to the Court of Appeals by the prosecuting attorney under Rule 28.04.

Rule 29.04, subd. 11 (Other Procedures) provides by reference that certain procedures set forth in Rule 28 shall also apply to discretionary appeals from the Court of Appeals to the Supreme Court under Rule 29.04. See the comments to Rule 28 for an explanation of those procedures referred to by Rule 29.04, subd. 11.

Rule 30. Dismissal

Rule 30.01 By Prosecuting Attorney

The prosecuting attorney may in writing or on the record, stating the reasons therefor, including the satisfactory completion of a pretrial diversion program, dismiss a complaint or tab charge without leave of court and an indictment with leave of court. In felony and gross misdemeanor cases, if the dismissal is on the record, it shall be

transcribed and filed.

Comment—Rule 30

See comment following Rule 30.02.

Rule 30.02 By Court

If there is unnecessary delay by the prosecution in bringing a defendant to trial, the court may dismiss the complaint, indictment or tab charge.

Comment—Rule 30

Rule 30.01 (Dismissal by Prosecuting Attorney) is adopted from F.R.Crim.P. 48(a) except that dismissal of a complaint or tab charge does not require leave of court. As to when jeopardy attaches, see comment to Rule 25.02. According to State v. Aubol, 309 Minn. 323, 244 N.W.2d 636 (1976), leave to dismiss must be granted if the prosecutor has provided a factual basis for the insufficiency of the evidence to support a conviction, and the court is satisfied that the prosecutor has not abused prosecutorial discretion. Prosecuting attorneys and judges should be aware of their obligations under Minn. Stat. § 611A.0315 (1992) of the Minnesota Crime Victims Rights Act concerning notice to domestic abuse victims upon dismissal or refusal to prosecute the charge.

Rule 30.02 (Dismissal by Court) is taken from F.R.Crim.P. 48(b) and takes the place of Minn. Stat. § 611.04 (1971). See also comment to Rule 11.11 relative to the constitutional right to a speedy trial and the consequences of a denial.

Rule 31. Harmless Error and Plain Error

Rule 31.01 Harmless Error

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

Comment—Rule 31

See comment following Rule 31.02.

Rule 31.02 Plain Error

Plain errors or defects affecting substantial rights may be considered by the court upon motions for new trial, post-trial motions, and on appeal although they were not brought to the attention of the trial court.

Comment—Rule 31

Rule 31.01 (Harmless Error) comes from F.R.Crim.P. 52(a).

Rule 31.02 (Plain Error) is adapted from F.R.Crim.P. 52(b).

Rule 32. Motions

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court or these rules permit it to be made orally. The motion shall state the grounds upon which it is made and shall set forth the relief or order sought and may be supported by affidavit.

Comment—Rule 32

Rule 32 (Motions) is taken from F.R.Crim.P. 47 and Minn.R.Civ.P. 7.02.

Rule 33. Service and Filing of Papers

Rule 33.01 Service; Where Required

Written motions other than those which are heard ex parte, written notices, and other similar papers shall be served upon each of the parties.

Comment—Rule 33

See comment following Rule 33.05.

Rule 33.02 Service; How Made

Whenever under these rules or by an order of court service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party personally is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions or as ordered by the court or as required by these rules.

Comment—Rule 33

See comment following Rule 33.05.

Rule 33.03 Notice of Orders

Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a copy thereof and shall make a record of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by these rules.

Comment—Rule 33

See comment following Rule 33.05.

Rule 33.04 Filing

(a) Except as provided in Rule 9.03, subd. 9, search warrants and search warrant applications, affidavits and inventories, including statements of unsuccessful execution, and papers required to be served shall be filed with the court. Papers shall be filed as provided in civil actions.

(b) Except as otherwise provided by this rule, search warrants and related documents need not be filed until after execution of the search or the expiration of ten days.

(c) A complaint, indictment, application, or affidavit requesting a warrant directing the arrest of a person or authorizing a search and seizure may contain or be accompanied by a request by the prosecuting attorney that the complaint, indictment, application or affidavit, any supporting evidence or information, and any order granting the request, not be filed.

(d) An order shall be issued granting the request in whole or in part, if the judge finds from affidavits, sworn testimony or evidence that there are reasonable grounds to believe that: (1) in the case of complaint, indictment, or arrest documents, such filing may lead to any person to be arrested fleeing or hiding or otherwise preventing the execution of the warrant or (2) in the case of a search warrant application or affidavit, such filing may cause this search or a related search to be unsuccessful or could create a substantial risk of injuring an innocent person or severely hampering an ongoing investigation.

(e) The order shall further direct that upon the execution of and return of an arrest warrant, the filing required by subd. (a) shall forthwith be complied with; and in the case of a search warrant, the application or affidavit in support thereof shall be filed forthwith following the commencement of any criminal proceeding utilizing evidence obtained in or as a result of the search, or at any other such time as directed by the judge. Until such filing, the documents and materials ordered withheld from filing shall be retained by the judge or the judge's designee.

Comment—Rule 33

See comment following Rule 33.05.

Rule 33.05 Facsimile Transmission

Facsimile transmission may be used for the sending of all complaints, orders, summons, warrants, and other documents including orders and warrants authorizing the interception of communications pursuant to Minn. Stat. Ch. 626A, and arrest and search warrants. All procedural and statutory requirements for the issuance of a warrant or order, including the making of a record of the proceedings, shall be met. For all procedural and statutory purposes, a facsimile order or warrant issued by the court shall have the same force and effect as the original. The original order or warrant, along with any other documents, including affidavits, shall be delivered to the court administrator of the county in which the request or application therefor was made. Any facsimile transmissions received by the court shall be filed as required by Rule 33.04 for the original of the document transmitted.

Comment—Rule 33

Rule 33.01 (Service; Where Required) comes from F.R.Crim.P. 49(a).

Rule 33.02 (Service; How Made) is taken from F.R.Crim.P. 49(b) and provides that service upon the attorney or a party shall be made in the manner provided in civil

actions, or as ordered by the court or as provided by these rules. Minn.R.Civ.P. 5.02 provides the method for service in civil actions. Rule 21.02 of these rules provides how the defendant shall be served with notice of the taking of depositions. Rules requiring notice or service are: Rules 7.01 (Rasmussen and Spreigl Notices); 9.02, subd. 1(3) (Notice of Defenses); 9.02, subd. 2(2) (Notice of Time and Place of Discovery on Order of Court); 9.02, subd. 2(4) (Notice of Results of Discovery Following Order of Court); 10.04, subd. 1 (Service of Motions); 28.02, subd. 3 (Discretionary Appeal); 28.02, subd. 4 (Procedure for Appeals Other than Sentencing Appeals by the Defendant); 28.04, subd. 2 (Procedure Upon Appeal of Pretrial Order by the Prosecuting Attorney); 28.04, subd. 3 (Cross-Appeal by Defendant); 28.05, subd. 1(1) (Notice of Appeal and Briefs in Sentencing Appeals); 29.03, subds. 1 and 3 (Procedure for Appeals by Defendant in First Degree Murder Cases); 29.04, subds. 1 and 2 (Procedure for Appeals From Court of Appeals); 29.04, subd. 5 (Response to Petition); 29.04, subd. 6 (Cross-Petition by Respondent).

Rule 33.03 (Notice of Orders) comes from F.R.Crim.P. 49(c) and Minn.R.Civ.P. 77.04. Rules 28.02, subd. 4(3), 29.03, subd. 3, and 29.04, subd. 2 provide for extension of time for taking an appeal.

Rule 33.04 (Filing) adopts F.R.Crim.P. 49(d) and Minn.R.Civ.P. 5.04 and 5.05.

The Rule as amended [in 1978] contains several safeguards against unwarranted orders which withhold the filing of documents referred to in the Rule. The prosecuting attorney, a responsible public official, must request the order; the request must be supported by adequate evidence showing the need for the order; the need must be found by a judge to exist; and, finally, when the arrest or search warrant has been executed, the documents must be filed immediately, and thereupon become available to the public. Supporting precedents for this Rule are: Grand jury secrecy about indictment issued; (Rule 18.08), Minn. Stat. § 626A.06, subd. 9, prohibiting disclosures of applications for and granting of warrants for interception of communications.

Rule 33.05 (Facsimile Transmission) is taken from Supreme Court Order # C4-87-1853, issued September 21, 1987, amended October 3, 1988. The rule supersedes Minn. Stat. §§ 626.11 and 626A.06, subd. 7 to the extent inconsistent.

Rule 34. Time

Rule 34.01 Computation

Except as provided by Rules 3.02, subd. 2(2), 4.02, subd. 5(1), 4.02, subd. 5(3), and 4.03, time shall be computed as follows:

The day of the act or event from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When a period of time prescribed or allowed is seven days or less, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes any holiday defined or designated by statute, and any other day appointed as a holiday by the President or the Congress of the United States or by the State.

Comment—Rule 34

See comment following Rule 34.05.

Rule 34.02 Enlargement

When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 26.03, subd. 17(3); 26.04, subd. 1(3); or 26.04, subd. 2, or except as provided by Rules 28.02, subd. 4(3), 29.03, subd. 3, and 29.04, subd. 2 the time for taking an appeal.

Comment—Rule 34

See comment following Rule 34.05.

Rule 34.03 For Motions; Affidavits

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing unless a different period is fixed by rule or order of court. For cause shown such an order may be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served not less than one day before the hearing unless the court permits them to be served at a later time.

Comment—Rule 34

See comment following Rule 34.05.

Rule 34.04 Additional Time After Service by Mail

Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon the party and the notice or other paper is served upon the party by mail, three days shall be added to the prescribed period.

Comment—Rule 34

See comment following Rule 34.05.

Rule 34.05 Unaffected by Expiration

The continued existence or the expiration of a term of court does not affect or limit the period of time provided for the doing of any act or the taking of any proceeding, or affect the power of the court to do any act or take any proceeding in any action which has been pending before it.

Comment—Rule 34

Rule 34.01 (Computation) adopts Minn.R.Civ.P. 6.01 except that it excludes Saturdays, Sundays, and legal holidays from computation when the period of time allowed is "seven days or less" rather than "less than seven days." Minnesota Statutes § 645.44, subd. 5 sets forth the legal holidays for the State of Minnesota.

Rule 34.02 (Enlargement) is taken from F.R.Crim.P. 45(b) and Minn.R.Civ.P. 6.02. It permits an extension of time except for motions for judgment of acquittal (Rule 26.03, subd. 17(3)), for new trial (Rule 26.04, subd. 1(3)), or to vacate judgment (Rule 26.04, subd. 2). The time for taking an appeal may not be enlarged except as provided by Rules 28.02, subd. 4(3), 29.03, subd. 3, and 29.04, subd. 2.

Rule 34.03 (For Motions; Affidavits) is taken from F.R.Crim.P. 46(d) and Minn.R.Civ.P. 6.04. Rule 10.03 requires notice of motions not later than three days before the Omnibus Hearing.

Rule 34.04 (Additional Time After Service by Mail) is taken from Fed.R.Crim.P. 45(c) and Minn.R.Civ.P. 6.05.

Rule 34.05 (Unaffected by Expiration of Term of Court) comes from Minn.R.Civ.P. 6.03.

Rule 35. Courts and Clerks

The district courts shall be deemed open at all times for the purpose of filing any proper paper, of issuing and returning or certifying process and of making motions and orders. Unless the court orders otherwise, the court shall be deemed open at all times, except legal holidays, for the transaction of any other business that may be presented. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, or particular legal holidays.

Comment—Rule 35

Rule 35 (Courts and Clerks) is adapted from F.R.Crim.P. 56 and Minn.R.Civ.P. 77.01. Legal holidays are defined by Minn. Stat. § 645.441, subd. 5 (1971). The rule supersedes Minn. Stat. §§ 484.07, 484.08 to the extent inconsistent.

Rule 36. Search Warrants Upon Oral Testimony

Rule 36.01 General Rule

Subject to the limitations contained in this rule, an officer legally authorized to request a search warrant may make such a request upon sworn oral testimony, in whole or in part, to a judge or judicial officer. Oral testimony may be presented via telephone, radio, or other similar means of communication. Any written submissions may be presented or communicated by facsimile transmission as well as by other appropriate means.

Comment—Rule 36

See comment following Rule 36.08.

Rule 36.02 When Request by Oral Testimony Appropriate

An oral request for a search warrant may only be made in circumstances that make it reasonable to dispense with a written affidavit. The judge or judicial officer should make this determination the initial focus of the oral warrant request.

Comment—Rule 36

See comment following Rule 36.08.

Rule 36.03 Application

The person requesting the warrant shall prepare a document to be known as a duplicate original warrant and shall read the duplicate original warrant, verbatim, to the judge or judicial officer. The judge or judicial officer shall enter, verbatim, what is so read on a document to be known as the original warrant. The judge or judicial officer may direct that the warrant be modified and any modification shall be included on both the original and the duplicate original warrant.

Comment—Rule 36

See comment following Rule 36.08.

Rule 36.04 Testimony Requirements

When the officer informs the judge or judicial officer that the purpose of the communication is to request a search warrant, the judge or judicial officer shall:

(1) Immediately begin recording, electronically, stenographically, or longhand verbatim the testimony of all persons involved in making the warrant application. Alternatively, with the permission of the judge or judicial officer, the recording may be done by the applicant for the search warrant, provided that the tape or other medium on which the record is made shall be submitted to the issuing judge or judicial officer as soon as practical and, in any event, not later than the time for filing as provided by Rule 33.04.

(2) Identify for the record and place under oath each person whose testimony forms a basis of the application and each person applying for the warrant.

(3) As soon after the testimony is received as practical, the judge or judicial officer shall direct that the record of the oral warrant request be transcribed. The judge or judicial officer shall certify the accuracy of the transcription. If a longhand verbatim record is made the judge or judicial officer shall sign it.

Comment—Rule 36

See comment following Rule 36.08.

Rule 36.05 Issuance of Warrant

If the judge or judicial officer is satisfied that the circumstances are such as to make it reasonable to dispense with a written affidavit, that the warrant request is in all other ways in conformity with the law, and that probable cause for issuance of the warrant exists, the judge or judicial officer shall order the issuance of a warrant by directing the person requesting the warrant to sign the judge or judicial officer's name on the duplicate original warrant. The judge or judicial officer shall immediately sign the original warrant and enter on the face of the original warrant the exact time when the warrant was signed. The finding of probable cause for a warrant upon oral testimony may be based on the same kind of evidence as is sufficient for a warrant upon affidavit.

Comment—Rule 36

See comment following Rule 36.08.

Rule 36.06 Filing

The filing of the original warrant, the duplicate original warrant, the certified transcript of the oral application for the warrant, any longhand verbatim record, and any related documents shall be in accordance with Rule 33.04. If the oral warrant request is recorded on tape or other electronic recording device, the original tape or other medium on which the record is made shall be filed with the court also.

Comment—Rule 36

See comment following Rule 36.08.

Rule 36.07 Contents of Warrant

The contents of a warrant issued upon oral testimony shall be the same as the contents of a warrant upon affidavit.

Comment—Rule 36

See comment following Rule 36.08.

Rule 36.08 Execution

The execution of a warrant obtained through oral testimony shall be subject to the same laws and principles that govern execution of any other search warrant. In addition, the person who executes the warrant shall enter the exact time of execution on the face of the duplicate original warrant.

Comment—Rule 36

The procedure prescribed by Rule 36 for obtaining a search warrant upon oral testimony, in whole or in part, is intended to provide a uniform method for addressing this situation, which has arisen in a number of cases in Minnesota. See e.g., State v. Cook, 498 Minn. 17 (Minn.1993); State v. Lindsey, 473 N.W.2d 857 (Minn.1991); State v. Andries, 297 N.W.2d 124 (Minn.1980); State v. Meizo, 297 N.W.2d 126 (Minn.1980). Fed.R.Crim.P. 41(c)(2), upon which this rule is largely modeled, and the statutes or rules of numerous states provide for obtaining oral warrants.

Rule 36.01 provides that the oral request may be made via any electronic method of oral communication. This is in conformity with Fed.R.Crim.P. 41(c)(2)(A). See also N.J. Rules of Crim.P. 3:5-3(5); Wis.Stat. § 968.12. The oral request may be supplemented by sworn written submissions. This is in accord with the amendment to Fed.R.Crim.P. 41(c)(2)(A), effective December 1, 1993.

Rule 36.02 establishes a standard of reasonableness for determining when circumstances dictate the substitution of an oral request for a warrant in place of the traditional written affidavits. This standard has been applied by the Minnesota Supreme Court in cases of this nature, State v. Lindsey, 473 N.W.2d 857 (Minn.1991), and is the standard applied by the federal rules. Fed.R.Crim.P. 41(c)(2)(A). This standard, rather than a stricter standard, is also utilized in order to encourage officers to obtain warrants in circumstances in which they might otherwise search without them. In assessing whether the exigency of the situation will justify a warrantless search, law enforcement officers should consider whether the possibility of obtaining a timely search warrant by oral electronic communication might subsequently prompt a reviewing court to find the warrantless search improper. See State v. Lindsey, 473 N.W.2d 857 (Minn.1991).

The judge or judicial officer should make the issue of why an oral warrant is required the initial item of business in the oral application process. See ABA Guidelines for the Issuance of Search Warrants, Guideline 11(3) (1990). If the reasonableness of this request is not established, the judge or judicial officer should so advise the officer and terminate the oral warrant procedure. While it is difficult to establish uniform criteria for determining when and under what circumstances oral warrant requests are acceptable, and it is recognized that these circumstances may vary case to case and county to county, some general criteria for use of this process include:

(a) the officer cannot reach the judge or judicial officer during regular court hours;

(b) the officer making the search is a significant distance from a judge or judicial officer;

(c) the factual situation is such that it would be unreasonable for a substitute officer, who is located near the judge or judicial officer, to present a written affidavit in person in lieu of proceeding with an oral application;

(d) the need for a search is such that without the oral warrant procedure a search warrant could not be obtained and there would be a significant risk that evidence would be destroyed.

State v. Lindsey, 473 N.W.2d at 863 (quoting E. Marek, Telephonic Search Warrants: A New Equation for Exigent Circumstances, 27 Clev.S.L.Rev. 35, 41 nn. 30-31 (1978)).

Although not required by the rule, prosecutors may want to direct law enforcement officers in their jurisdiction to involve a prosecutor, where practical, in making the oral request for a search warrant to the judge or judicial officer. See ABA Guidelines for the Issuance of Search Warrants, Guideline 11(1) (1990). Doing so will not only make it easier for the officer to prepare the warrant, it will reduce the possibility of inadvertent omissions in the oral presentation that might compromise the validity of the warrant and that might otherwise be undetected until after the seizure is made. Involving the prosecutor in this process limits the risk of omission and helps to organize the materials for the judge or judicial officer. State v. Lindsey, 473 N.W.2d at 864, n. 2

(quoting R. Van Duizend, The Search Warrant Process, 109 Nat'l Center for State Courts (1985)).

Minn. Stat. § 626.16 which requires that a written document be prepared for presentation to the person whose premises or property is searched, or that can be left on the premises if no persons are present, mandates the process set forth in Rule 36.03. The use of a "duplicate original" warrant is modeled upon Fed.R.Crim.P. 41(c)(2)(B), and is a process also utilized in other state statutes and rules permitting oral warrants. See e.g., Ariz.Stat. § 13.3915(c); N.J.Rules of Crim.P. 3:5-3(5); Wisc.Stat. § 968.12(b). It is strongly suggested that officers carry appropriate forms with them to enable preparation of duplicate original warrants without undue difficulty. Similarly, judges and judicial officers who may receive oral warrant requests at home are advised to have appropriate forms available for preparation of the original warrant.

Rule 36.04 establishes important procedural requirements. The desirability of a contemporaneous record was articulated in State v. Lindsey, 473 N.W.2d at 862, and the earlier opinion of State v. Meizo, 297 N.W.2d at 129, and is a requirement of Fed.R.Crim.P. 41(c)(2)(D) and state statutes and rules which permit oral warrants. The oath is an essential element of the oral warrant request process utilized by other jurisdictions that provide for oral warrants. See e.g., Fed.R.Crim.P. 41(c)(2)(A); Ariz.Stat. § 13.3914(c); N.J.Rules of Crim.P. 3:5-3(5); Wisc.Stat. § 968.12(A).

Judges and judicial officers are cautioned to avoid engaging in any preliminary unrecorded and unsworn conversation with the officer or prosecutor. See ABA Guidelines for the Issuance of Search Warrants, Guideline 11(3) (1990).

In order to complete the record, the recorded oral testimony must be transcribed, the transcript reviewed by the judge or judicial officer to insure its accuracy, and the transcript filed. This is a requirement of Fed.R.Crim.P. 41(c)(2)(D) and most state statutes and rules which permit oral warrants. If the recording is done by the applicant rather than the judge or judicial officer, the applicant must provide the tape or other original record to the issuing judge or judicial officer as soon as practical so that the judge or judicial officer will be able to have the transcript timely prepared and filed as required by the rule.

Pursuant to Rule 36.05 the judge or judicial officer may issue the warrant only after assuring that reasonable circumstances exist for the use of the oral warrant process, that the application is otherwise in conformity with law, and that probable cause exists for the issuance of the warrant. The officer and the judge or judicial officer must keep in mind that in addition to the special requirements for issuance of an oral warrant, all other requirements for the issuance of a warrant must also be met. See Minn. Stat. §§ 626.05-.17 (1992). Once these requirements are met, the judge or judicial officer may authorize the officer to sign the name of the judge or judicial officer to the duplicate original warrant. Rule 36.05 also requires that the judge or judicial officer note the exact time the original warrant is signed.

In ruling on the oral warrant application, it is strongly suggested that the judge or judicial officer state on the record whether probable cause exists, what premises or persons may be searched under the warrant, and highlight any differences between the authority requested and that granted. The judge or judicial officer should also identify what items may be searched for under the warrant and indicate whether the request has

been modified or limited. See ABA Guidelines for the Issuance of Search Warrants, Guideline 11(12) (1990).

Rule 36.06 mandates filing under the provisions of Rule 33.04, which contains special provisions for filing warrants and related documents. The judge or judicial officer is responsible for seeing that the certified transcript, any longhand verbatim record, and the original warrant are filed. Additionally, Rule 36.06 requires that if the record was made using a tape recorder, the original tape be filed as well. If any other form of electronic recording device is utilized, the medium upon which that record is made must also be filed. This requirement ensures the accuracy of the oral warrant record and emphasizes a principal concern of this process, that the oral submissions be as reviewable after the fact as traditional affidavits.

Rules 36.07 and 36.08 also emphasize that the oral warrant process must observe all the formalities of the conventional warrant process. All concerned are cautioned that the circumstances that permit the use of the oral warrant process do not justify any other departures from traditional warrant law and practice. The additional requirement in Rule 36.08 that the person executing the warrant enter the time of execution on the duplicate original warrant is modeled on Fed.R.Crim.P. 41(c)(2)(F). Rule 36 does not specify sanctions for violation of the various procedural requirements of the rule. That is left to caselaw development.